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82-1674

In The

Supreme Court of the United States

October Term, 1982

No.

IRVING SETH LEVINE and GRACE F. LEVINE,
Petitioners,

-against-

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

GRACE FLAX LEVINE
Attorney for Petitioners
Wayside Lane, P.O. Box 84
West Redding, CT 06896
(203) 938-9367

PRINTINGHOUSE PRESS—(212) 719-3120

Questions Presented

1. Is the Second Circuit Court of Appeals decision in the instant case in conflict with the interpretation of the Sixth and Seventh Circuit Courts of Appeals, both as to 1954 Congressional intent and the legal effect of the United States Supreme Court's decision in Commissioner of Internal Revenue v. Bilder, 369 U.S. 499 (1962)?
2. Do the Treasury Regulations and Revenue Rulings issued by the Commissioner of Internal Revenue, implementing Sec. 213 (e) (1) (A) and (B) of the IRC permit the Commissioner complete subjectivity inevitably resulting in discriminatory and unequal treatment of taxpayers?
3. The opinions of the United States Supreme Court and the Circuit Courts

of Appeals are binding on the lower United States Tax Court and on the Commissioner of Internal Revenue. Can the United States Tax Court and the Commissioner selectively ignore those opinions they view with disfavor?

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COMMISSIONER OF INTERNAL REVENUE,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Irving Seth Levine and Grace F. Levine petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit, dated December 6, 1982, affirming a United States Tax Court decision, en-

tered October 21, 1981 (Sheldon V. Ekman, Judge), denying taxpayers' request for medical deductions for psychiatric care for their son in Topeka, Kansas.

Opinions Below

The opinion of the Court of Appeals is appended hereto, as well as the court's Order, filed January 18, 1983, denying taxpayers' petition for a rehearing in banc.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254 (1).

Statutes Involved

Federal Statute - Internal Revenue Code Sec. 213 (e) (1) (A) and (B) and Treasury Regulation 1.213-1(e) (iv) and Treasury Regulation 1.213-1(e)(v).

Internal Revenue Code (1954) Sec. 213

(e) DEFINITIONS - for purposes of this section

(1) the term "medical care" means amounts paid

(A) for the diagnosis, cure, mitigation, treatment, or prevention of disease, or for the purpose of affecting any structure or function of the body.

(B) for transportation primarily for and essential to medical care referred to in subparagraph (A).

Treasury Regulations 1.213-1(e)(iv) and (v).

(iv) "Expenses paid for transportation primarily for and essential

to the rendition of the medical care are expenses paid for medical care. . . "

(v) " . . . The extent to which expenses for care in an institution other than a hospital shall constitute medical care is primarily a question of fact which depends upon the condition of the individual and the nature of the services he receives (rather than the nature of the institution) . . . ."

Statement

Treasury Regulation 1.213-1 (e) (v) states it is primarily a question of fact whether expenses for medical care in an institution other than a hospital are deductible under Sec. 213(e)(1)(A)(B).

This regulation permits the Commissioner of Internal Revenue to become the doctor of last resort, and to sift and define what the Commissioner considers medical care.

In order to show that the present taxpayers are well within the factual situations already allowed by the Commissioner, and independently of any such prior situations taxpayers have pursued and paid for a course of medical, psychiatric care within the intent and purview of the statute, the facts will be fully set forth and linked to the medical depositions in the Appendix.

On March 3, 1969, taxpayers' son was admitted in-patient to the Children's Hospital, The Menninger Clinic, Topeka, Kansas, where he remained for four years.

It was from The Menninger Clinic that taxpayers learned that their son was born celiac, and that the mental illness probably had been in existence since birth.

In March, 1973, taxpayers' son was released to continue the treatment that The Menninger Clinic considered essential by the creation of a "substitute hospital" in the community.

The Commissioner has disallowed taxpayers a medical deduction under Sec. 213 IRC for the years 1974 and 1975 for the expenses incurred in maintaining the "substitute hospital".

The following are the facts culled from the depositions admitted as evidence by the United States Tax Court. Counsel for IRS have at no time attempted to controvert, diminish or amend any of the medical history, diagnosis, or medically estab-

lished treatment method.

Facts for Tax Years 1974 and 1975

A. Deposition of Dr. Verlyn Norris, Staff Psychologist, The Menninger Foundation.

1. Guy Levine suffers from a particularly stubborn and long-standing form of mental disturbance, requiring both in-patient and out-patient treatment (106a).*

2. The stubborn nature of Guy Levine's illness requires very skillful handling, support, attention and medical participation (106a).

3. Guy's illness is unique in several respects: (a) its long duration, (b) the tenuous balance between reality and fantasy (an unusual combination), and

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* References are to the numbered pages in the Appendix.

c) the difficulty of maintaining this balance (107a).

4. It is the opinion of Dr. Norris that it was and is medically and psychiatrically essential that Guy remain in Topeka (107a,108a).

5. In 1973, when Guy was released from The Menninger Clinic, he continued to need "residential care" (109a,110a).

6. The only option available for providing that care was for Guy to move into an apartment in the community, continue treatment, but be administratively severed from the in-patient hospital (110a).

7. Available to Guy were all the support services of the in-patient facility, only administratively they were provided through the out-patient clinic, such as: medical doctors for medications, access to

all in-patient and out-patient services, and after-care services (112a,113a).

8. The presence of these support services were of vital importance in the continuing treatment program for Guy and for the staff of The Menninger Clinic (114a,115a).

9. At the time of Guy's release in 1973 the Children's Hospital had no apartment plan for children -- and still does not (115a). Even if an adult apartment living program had been available to him, he did not have the requisite degree of self-sufficiency (116a).

10. Therefore, in order to treat Guy, a unique situation had to be created, and was created (117a) by The Menninger Clinic with the assistance of Guy's parents and Mr. Glassman (117a).

11. Menninger Foundation social workers were not available for the creation of this unique environment (117a,119a,121a, 122a), and it was The Menninger Clinic belief that social service help might be more

successful if handled by a person such as Mr. Glassman (119a, 120a).

12. The environment that was created for Guy in the community is a "therapeutic environment" and part of his total treatment program (126a).

13. Driving instruction was initiated by The Menninger Clinic (127a,128a) for mobility to utilize all the services of the clinic (129a,130a).

14. Guy is unable to sustain any kind of gainful employment (131a).

15. Dr. Norris' professional opinion is that Guy must live in Topeka (132a); "we've simply shifted the treatment program" (133a).

16. The distinguishing features between a medical procedure and mental health problems are a) the brevity of medical treatment, b) the medical patient is competent to manage his own affairs,

c) in mental health, the living arrangements become part of the treatment program. In Guy's case it represents a "substitute hospital" (hypothetical question) (138a,139a).

17. The treatment process of The Menninger Clinic has been used and profited from by Guy, a) to move forward and b) to prevent his becoming so disorganized that hospitalization was absolutely mandatory (140a,141a,142a).

18. The risks of leaving Topeka were, a) that entry into treatment somewhere else was extremely limited, if not impossible, b) the loss of outside treatment resources, and c) the great likelihood of a retreat into a psychotic state (158a).

19. The frequency of therapy is no indication of the severity of mental illness (160a,161a,162a).

20. It is not the practice of The Menninger Clinic doctors to supervise or care for any of the day to day living activities of any patient (163a,164a).

B. Deposition of Dr. Erwin Janssen, Director of The Children's Division, The Menninger Foundation.

21. It is Dr. Janssen's opinion that a break in treatment by leaving Topeka would have resulted in periods of regression that would require re-hospitalization from time to time (46a,47a), and a gradual deterioration of Guy's personality so that even the simple issues of daily living would become monumental (48a).

22. It is Dr. Janssen's judgment that Topeka represented the best possibility that Guy could have had for a treatment process (49a).

23. Guy's relationship with Dr.

Norris was not reproducible anywhere else (49a, 50a), and represented a "life-giving as well as life-saving process" (51a).

24. The Menninger Clinic support services are essential for Guy's psychological needs; without them he could have had "a psychotic break of major proportions" (51a,52a).

25. Guy is dependent upon The Menninger Clinic facilities for his "total medical psychiatric care" (54a).

26. In 1974 and 1975 Guy was too ill to be admitted to the then established after-care facilities; his apartment represented a lower level of functioning (55a,56a).

27. It is clinical practice at The Menninger Clinic to have the patient's family involved, and Guy's family setting him up in the community is consistent

with that practice (59a).

28. The car was needed for mobility and psychiatric independence (62a,63a); Guy's "need to have some hint of independence is an important treatment issue" (81a).

29. Guy's present step forward (hospitalization) would not have been possible without the therapeutic community arrangements that preceded it (64a,65a,66a).

30. The nature of a psychiatric treatment process often implies a focus on the person's ability to manage living and organizing one's time and person. That is not the case for most medical cases because the person psychologically and mentally is able to do that for himself (68a,69a) (hypothetical question).

31. A patient's living environment is part of his treatment (69a).

32. Guy was too ill for any of the established after-care programs. His living arrangement represented a lower level of functioning than for someone able to manage after-care programs (69a,70a).

33. Guy's apartment was "much like any apartment that our after-care patients live in" (79a).

34. The apartment cannot be separated from the treatment process (80a).

35. Once Guy was admitted to The Menninger Foundation for treatment, it was imperative that he continue there for the sake of continuity (85a).

36. The frequency of therapy is no indication of how ill a patient may be (95a,96a).

C. Deposition of Arthur Glassman, Esq., Attorney - Guardian/Trustee

37. Glassman has a substantial back-

ground in mental health concerns having worked with physicians from the following hospitals:- Menninger, Memorial, Topeka State Hospital, Parsons State and the Veterans Administration (169a).

38. Glassman was requested by the Levines to be a legal-social worker for Guy, and be responsible for finances, his legal relationships, management of his person, monitor his problems and be responsible for contacting The Menninger Clinic. The clinic being primarily responsible for Guy's treatment (171a).

39. Glassman's duties consisted of managing Guy's finances by establishing a trust account, periodic payments to Guy, supervision of how funds were used, and payment of all bills (172a).

40. Glassman also took care of the community relationships, or social work

side, by working with the apartment manager, handled insurance and the telephone company, assisted Guy in clothes purchases, assisted in procuring medical prescriptions, and repairs for the car (173a).

41. A cleaning lady was essential if Guy was not to be "kicked out" of his apartment (174a).

42. The average stay of the cleaning lady at Guy's apartment was one hour to two hours per week (175a,176a).

43. Guy's vehicle is required to be insured under Kansas compulsory insurance law (176a).

44. Glassman's fee was primarily for non-legal duties, for his supervisory guardianship cares (177a).

45. Glassman saw his function as complementing Dr. Norris, Dr. Janssen and

the Menninger focus of maintaining some stability for Guy outside the hospital (178a, 179a). Of trying to maintain stability for Guy in an environment that wasn't readily accepting of him (179a); and being supplementary and complementary to whatever The Menninger Clinic was supplying (179a,180a).

46. The mental condition of taxpayers' son was such that he was unable to manage his own affairs (182a).

47. Without a guardian Guy could not function outside the hospital (184a,185a).

48. Glassman was a participant in the treatment process in that he was charged with and did make known to the physician and treating psychologist at The Menninger Clinic his observations and opinions of the progress and potential severity of Guy's problems (186a).

49. Glassman was working for Guy,

although paid by Levines (188a).

50. In Glassman's opinion Guy is not "on his own" in the apartment. Guy cannot totally function on his own (192a).

51. Glassman knows of no medical paraphernalia one uses for psychiatric treatment (194a,195a).

52. Guy is unemployable (195a, 196a) and in the opinion of Mr. Glassman is severely ill and in fact incapacitated (198a).

Reasons for Granting the Writ

1. This case presents a clear and unequivocal conflict between the United States Supreme Court, the Courts of Appeals of the Sixth and Seventh Circuits and the recent opinion of the Court of Appeals for the Second Circuit, the basis for this petition.

At issue is what Congress intended in 1954 when Sec. 213, subsection (e) was amended.

Congressional Intent - Sec. 213 Internal Revenue Code has rarely been challenged in the years between 1954 and 1983. However, in each and every challenge in the federal courts, including the Second Circuit in the instant case, Congressional intent was reviewed, and, with the exception of the present opinion, it was found Congress intended only to exclude from the definition of medical care under Sec. 213 resort area vacations.

The decisions being so few in number, they follow:

A. U. S. Supreme Court

Commissioner of Internal Revenue v.

Bilder, 369 U.S. 499 (1962). This case concerns the deductibility as medical care under Sec. 213 IRC of 1954, of rent for an apartment in Florida when taxpayer was ordered by his physician to spend the winter months there. Taxpayer suffered from a heart condition.

Apparently there was much abuse of the "resort area vacation" as a medical expense.

This Court quoted extensively from the House and Senate Committee Reports of the 1954 amendment. The Congressional Reports with respect to subsection (e) "clarifies existing law . . . 'For example, if a doctor prescribes that a patient must go to Florida in order to alleviate specific chronic ailments and to escape unfavorable climatic conditions . . . '" the cost of meals and lodging away from home

are not deductible.

Similarly, medical treatment of choice -- such as an appendectomy -- secured in another area for personal considerations does not bring the living expenses within the purview of the amendment.

However, "'The subsection is not intended otherwise to change the existing definition of medical care, to deny the cost of ordinary ambulance transportation nor to deny the cost of food or lodging provided as part of a hospital bill'."* (Emphasis supplied by Court) (p. 502).

The Bilder case, supra, put the Court's imprimatur on the abolition of

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* H.R. Rep. No. 1337, 83 Cong., 2d Sess. A60 (1954); S. Rep. No. 1622, 83d Cong., 2d Sess. 219-220 (1954).

resort area vacations as allowable medical expense. There is nothing in this opinion which is dispositive of any other area, nor do the facts in this case go beyond a Florida vacation for a taxpayer with chronic heart disease.

Note this Court's emphasis that nothing in the Congressional reports changes the existing definition of medical care.

Of interest is the Commissioner's argument as set forth in the Court's footnote #5 (p. 504) that

> " . . . apart from the medical 'transportation' expense provided in Sec. 213 (e) (1) (B), no other express exception can be found in the statute . . . " (Court's emphasis)

In effect the Commissioner conceded that the only express exception and change in the present statute is the one given above (sub-par. [B] only, not sub-par. [A]). This Court did not consider this alterna-

tive argument to Congressional intent, as the explicitness of the Committee Reports made it unnecessary; and the facts in the Bilder case, involving only resort area vacations, were completely encompassed therein.

B. Sixth Circuit Court of Appeals

Gerstacker v. Commissioner of Internal Revenue, 414 F.2d 448 (1969)

In this challenge to the Commissioner, legal expenses were incurred in order to establish guardianships in two states so that Mrs. G. would be involuntarily committed for treatment to a mental hospital. When she was released the guardianships were terminated.

The Tax Court held the expenses to be non-deductible personal expenses.

The Sixth Circuit examined Sec. 213 (e) (1) (A) and (B) of the IRC:

> "It is . . . clear in construing the term 'medical care' in the light of the legislative history, as the Supreme Court did in Commissioner of Internal Revenue v. Bilder, 369 U.S. 499, 82 S.Ct. 881, 8 L.Ed. 2d 65, that Congress intended to define 'medical care' broadly and that the legislation was remedial in nature.
>
> * * * * *
>
> "It is also obvious that commitment proceedings played a role in medical treatment, and that except for Mrs. Gerstacker's illness these legal expenses would not have been incurred. [p. 450]
>
> * * * * *
>
> "It is difficult to conceive of a situation where the relationship between the guardianship expenses and the treatment of Mrs. Gerstacker's illness would be more direct or proximate." (p. 451)

Interestingly, the Commissioner in this case relied on Bilder, supra, and an interpretation of the House and Senate Reports as excluding the guardianship expenses as non-medical.

The Sixth Circuit addressed this argument as follows:

> "The same reports clearly indicate a congressional intent to permit deduction of expenses which under the Commissioner's analysis in the present case would be indirect expenses and not deductible. [p. 452]
>
> * * * * *
>
> "We hold that where legal expenses are necessary to legitimate a method of medical treatment for mental illness, they are 'amounts paid * * * for the diagnosis, cure, mitigation, treatment, * * * of disease' and are deductible under Sec. 213(a) of the Internal Revenue Code of 1954 as expenses for 'medical care'." (p. 453)

The present taxpayers employed an attorney-surrogate, Arthur Glassman, Esq., whose deposition is replete with information and facts attesting to his integration and cooperation with a prescribed course of medical-psychiatric treatment only available in Topeka and not duplicatible anywhere else in the U.S.

(166a-198a). These are certainly expenses "necessary to legitimate a method of medical treatment for mental illness" (Gerstacker, supra).

Montgomery v. Commissioner of Internal Revenue, 428 F.2d 243 (1970).

Taxpayers sought to deduct food and lodging expenses incurred while traveling to and from place of medical treatment (Sec. 213(e) (1) (B)).

The court held the expenses to be deductible. In so doing again it examined congressional intent:

> "It is apparent that the concern of Congress and the Treasury was to eliminate the abuse of 'resort area' medication." (p. 245)

C. Seventh Circuit Court of Appeals

Kelly v. Commissioner of Internal Revenue, 440 F.2d 307 (1971)

In a fact situation identical to that

of the present taxpayers, the Circuit Court of Appeals allowed medical deduction under Sec. 213(e) (1) (A) (B) for a hotel room used as a "substitute hospital".

Kelly, a resident of Milwaukee, underwent an emergency appendectomy in New York. When the New York hospital discharged Kelly, as it needed the space, he moved to a hotel room and his wife came east to assist in caring for him. His wife was not a nurse, nor was she trained in nursing.

The Commissioner urged in the Kelly case, as he does here, that Treasury Regulation Sec. 1.213-1(e) (1) (v) prohibits the cost of hotel room and food as deductible medical expenses.

The Circuit Court:

> "The Commissioner assumes that the deduction would have been allowed

under the Internal Revenue Code of 1939, but interprets the 1954 amendment to the definition of medical care, and the regulations promulgated thereunder, as requiring disallowance. . . . In our view, it is more precise to state that a statutory amendment led to the adoption of the regulation. It is, therefore, appropriate to ascertain the purpose of the amendment as a guide to interpretation of its implementing regulations. [p. 308]

* * * * *

"In this case, taxpayer . . . relies solely on subparagraph (A), contending that the purpose of the 1954 amendment to the definition of medical care is inapplicable to the unusual circumstances which made it necessary for him to use a hotel as an interim place of convalescence. We believe he correctly interprets the legislative history and the Supreme Court decision in Commissioner of Internal Revenue v. Bilder, 369 U.S. 499, 82 S.Ct. 881, 8 L.Ed.2d 65." (p. 309)

D. Second Circuit Court of Appeals

Levine v. Commissioner of Internal Revenue, Docket No. 82-4035 (Decided 12/2/82; Order denying petition for rehearing 1/18/83)

In the instant case the court's opinion attempts to differentiate between the facts in Kelly, supra, and those herein presented. ". . . the Levines did not incur expenses for care in the apartment, whether or not we recognize substitute institutions and whether an apartment may qualify as such. We do not reach the legal issue decided by the Seventh Circuit; . . . " (p. 601) (7a).

A reading of the medical testimony in this case (as set forth in the Appendix) establishes that this is a distinction without a difference. In psychiatric treatment, even if in-patient, no therapy is given in the patient's room or living quarters. All patients visit the analyst, not vice versa. As for medical equipment, none is required, and none is used by The Menninger Clinic.

The majority opinion also misreads the testimony by indicating that Menninger's was the treatment facility of choice (p. 597) (3a). At least twice during the course of his testimony the Menninger therapist stated that no other institution contacted by them was willing to accept taxpayers' son; so that even though the parents had agreed to a possible transfer, none could be arranged (134a,135a,156a,157a).

As to the guardianship fees the court found they were not "'necessary to legitimate a method of medical treatment' Gerstacker v. Commissioner, supra." (p.604) (10a). The record indicates that without the guardian-surrogate to manage patient's affairs there would have been no

medical treatment. Without him the substitute hospital could not have been maintained for a week.

Concurring in the result, Judge Winter states as follows:

> "My difference with the majority has to do with its view of the decision of the Seventh Circuit in Kelly v. Commissioner, 440 F.2d 307 (7th Cir. 1971). Because I believe that the Levines' expenses for their son's food and lodging are a fortiori deductible under the theory of Kelly, I write separately. If, on the one hand, we are going to accept the harsh result dictated by the relevant statutory provisions and regulations, we should not create a substantial area of doubt, on the other, by attempting to reconcile our decision with the contrary and more lenient decisions of another circuit. (p. 605) (11a)
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> * * * * *
>
> "The majority agrees that Kelly's hotel lodging is analogous to Guy Levine's apartment but argues that Kelly's deduction of hotel costs were proper because his wife was present and rendered assistance. This distinction borders on the bizarre in my view." (Emphasis supplied.) (p. 606) (12a)

The concurring opinion says it all. The reasoning of the majority is tenuous and chooses to avoid a realistic assessment of the intense day-to-day effort expended by all to keep this patient from a total flight into fantasy. Commissioner v. Bilder, supra, is cited as authority for the court's decision; although in footnote #2 the court quotes the same House and Senate reports as the other two Circuits and then applies them differently.

2. The Treasury Regulations and Revenue Rulings issued by the Commissioner are completely subjective, inevitably making the Commissioner the doctor of last resort, and resulting in discriminatory treatment of taxpayers.

> "In a perverse departure from the facts in Kelly, however, Guy Levine

> cannot take advantage of the Menninger Clinic's adult apartment living program, for which the expenses would be deductible, see IRS Letter Ruling 7714016, (1977) (citation omitted) not because he is too well, but because he is too ill. . . . Indeed, resort to a non-institutional residence was more of a medical necessity in the case of Guy Levine than in the case of Mr. Kelly." (Winter, J., p. 606) (12a)

The wording of Revenue Ruling #7714016 states 1) the residents for such transitional care are recommended by a psychiatrist, 2) they remain under psychiatric supervision during their stay at Menninger, and 3) the staff of Menninger includes a psychiatrist, mental health counsellors and other workers. Nowhere in the ruling is it required that the mental health professionals be resident in, or treat the patients in the transitional care facility. Nor does the Commissioner in this ruling require the presence of any medical para-

phernalia.

Similarly in Revenue Ruling #69-499, a medical deduction was allowed for a taxpayer's son, age 24, to live with unrelated people -- arranged for by the taxpayer -- upon recommendation of the boy's doctor. The Commissioner allowed all expenses as medical deductions under Sec. 1.213-1 (e) (1) (v) ruling the private home of strangers to be an "institution", and that the care is given at "arm's length". What is "arm's length"? The Second Circuit Court of Appeals adopts this standard (p. 599) (5a) but nowhere defines it.

In this case the arms were long enough. Certainly the care was given by strangers for pay, and the amount of time devoted to the task was determined by accepted psychotherapeutic standards.

What's missing?

3. Are the opinions of the U.S. Supreme Court and the Circuit Courts of Appeals binding on the lower U.S. Tax Court and on the Commissioner of Internal Revenue?

In a case decided by this Court on June 8, 1981, Rowan Companies, Inc. v. United States, 49 United States Law Week 4646, a Treasury Regulation was struck down as being inconsistently and unevenly applied. In so doing, this Court examined the Commissioner's private rulings from 1954 to 1965 (footnote #17, p. 4650) and stated in its opinion:

> 1. A Treasury Regulation must harmonize with the plain language of the statute, its origin and its purpose (p. 4648).
>
> 2. Where the Commissioner acts

under specific authority, the primary inquiry is whether the Commissioner's interpretation is within the delegation of authority.

3. Among the considerations relevant to Treasury Regulations is whether the regulation "'is a substantially contemporaneous construction of the statute by those presumed to have been aware of congressional intent'" (citations omitted) (p. 4648).

4. Also considered pertinent is "'the consistency of the Commissioner's interpretation, and the degree of scrutiny Congress has devoted to the regulation during subsequent reenactments of the statute.'" (p. 4648)

That taxpayers are entitled under the law to equal treatment and even-handedness

by the Commissioner is not a new principle. What is given to one, even if in a private ruling, must be given to similarly placed taxpayers.

In IBM Corp. v. United States, 170 Ct. Cl. 346 (1965), the Court of Claims held that the Commissioner abused his discretion when he denied IBM's application for a non-taxable ruling similar to the one given to Remington Rand. IBM was entitled to recover taxes paid. The Court of Claims further held that the taxpayer need not show any special detriment or reliance on a revenue ruling or decision, merely that his right to equal treatment has been violated.

The Second Circuit Court of Appeals in this case states:

> ". . . only those medically necessary away-from-home living arrangements

> which involve continuous daily medical care on the premises may give rise to favorable tax treatment for the cost of meals and lodging. See generally Volwiler v. Commissioner, 57 T.C. 367, 371-72 (1971)." (9a).

Two points must be made with respect to this standard:

1. Where in Revenue Rulings #7714016 (Menninger Transitional Living Program) or in #69-499 (home for a 24 year old retarded person) is there any mention of "continuous daily medical care on the premises"? In fact there is none given to the individuals involved.

Taxpayers in this case are suddenly confronted with an entirely new concept which even the Commissioner has not applied.

2. The Volwiler case, supra, arose in the state of Washington (Ninth Circuit). Taxpayers chose not to appeal even though

it was decided shortly after the Kelly case, supra. What disposition would this case have had if it had come up through the Sixth or Seventh Circuits?

Conclusion

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

GRACE FLAX LEVINE
Attorney for Petitioners

Dated, April, 1983

OPINION

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 31—August Term, 1982

(Argued August 30, 1982 Decided December 6, 1982)

Docket No. 82-4035

IRVING SETH LEVINE and GRACE F. LEVINE,

Petitioner-Appellants,

—against—

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellee.

Before:

KEARSE, CARDAMONE and WINTER,

Circuit Judges.

Appeal from a decision of the United States Tax Court entered October 21, 1981 (Sheldon V. Ekman, Judge) which denied appellants' medical expense deductions for living expenses and other costs associated with maintain-

ing their son as a psychiatric outpatient in Topeka, Kansas.

Affirmed. Judge Winter concurs in a separate opinion.

GRACE FLAX LEVINE, West Redding, CT, *for Petitioner-Appellant.*

ANN DURNEY, Tax Division, Department of Justice, Washington, D.C. (Glenn L. Archer, Jr., Assistant Attorney General, Michael L. Paup, Daniel F. Ross, Washington, D.C., of counsel) *for Respondents-Appellees.*

CARDAMONE, *Circuit Judge*:

Grace and Irving Levine are Connecticut residents who appeal from a decision of the United States Tax Court entered on October 21, 1981 by Judge Sheldon V. Ekman which denied them a medical expense deduction for costs associated with maintaining their mentally ill son in an outpatient psychotherapeutic arrangement in Topeka, Kansas. Since we believe that the Tax Court correctly ruled that the expenses in question are not deductible, we affirm. We are not unsympathic to the argument presented by Mrs. Levine and to the efforts she and her husband are making to provide their son Guy with the best medical care available. However, a court's personal view of what is wise, enlightened or compassionate should not substitute for legislative judgment. We are

constrained by the statutes and regulations as written, and by the expressed purposes of those who wrote them.

I

Appellants' son spent the years 1969 through 1973 as a patient at the Children's Hospital of the Menninger Clinic in Topeka, Kansas, suffering from mental illness. When he became too old to remain at the Children's Hospital, he refused to accept treatment at any other facility which would accept him and which was close enough for him to continue working with his Menninger Clinic therapist. At the same time, the Menninger staff found that Guy was not adequately self-sufficient to enter the hospital adult apartment living program.

Guy's parents therefore established a unique outpatient arrangement. Guy used the Clinic facilities but lived in a rented furnished efficiency apartment elsewhere in Topeka. His parents bought him a car which he used to transport himself to and from the clinic and to attend to his personal business, such as grocery shopping. Arthur Glassman Esq., a Topeka attorney, was retained by the Levines to help Guy manage his daily affairs. Glassman's duties included paying Guy's bills, hiring a housekeeper, handling household and insurance problems, procuring employment for Guy, and assisting in the purchase of clothes, prescriptions and auto repairs.

Appellants sought to deduct as medical expenses the costs of the car and car insurance, Glassman's services, and Guy's meals and lodging for the years 1974 and 1975. The Tax Court denied the deductions, ruling that these were nondeductible personal expenses.

II

Section 213(a) of the Internal Revenue Code of 1954 allows a deduction for expenses paid for the medical care of a taxpayer and his dependents. IRC § 213(a)(1976). Section 213(e)(1) defines medical care expenses as amounts paid

> (A) for the diagnosis, cure, mitigation, treatment, or prevention of disease, or for the purpose of affecting any structure or function of the body, [and]
>
> (B) for transportation primarily for and essential to medical care referred to in subparagraph (A)
>
> . . . .

IRC § 213(e)(1) (1976).

Living expenses of one receiving outpatient medical care away from home are ordinarily not deductible medical expenses. *Commissioner v. Bilder*, 369 U.S. 499, 501-03 (1962); *Montgomery v. Commissioner*, 428 F.2d 243, 244-45 (6th Cir. 1970); *Oliver v. Commissioner*, 364 F.2d 575, 578-79 (8th Cir. 1966); Treas. Reg. § 1.213-1(e)(1)(iv)(1982). However, if an individual is staying in a hospital principally to receive medical care, then board and lodging at the hospital are deductible medical expenses. *See Bilder*, 369 U.S. at 502-03 & n.4; Treas. Reg. § 1.213-1(e)(1)(v) (1982).

The extent to which costs for care in an institution other than a hospital constitute deductible medical expenses is a question of fact which depends on the *condition of the individual* and *the nature of the services* he receives, not on the nature of the institution. Thus, if an individual is in an institution primarily because his condition requires the particular type of medical services available there, the entire cost of such medical care, together

with meals and lodging necessarily furnished while the individual requires continual care at the institution, are deductible medical expenses. For example, deductible medical expenses include the full cost of institutionalization for a mentally ill person who may not safely be left alone. On the other hand, if an individual is institutionalized in a setting in which he receives medical care, but the availability of such care is not the principal reason for his presence there, then only that part of the institutional cost attributable to medical care is deductible; meals and lodging at the institution are not. As an example, deductible medical expenses will not include the cost of room and board in a home for the aged if an individual is in such home primarily for personal or family reasons, even though the cost of nursing and other medical services provided in the home are deductible. Treas. Reg. § 1.213-1(e)(1)(v)(1982).

A private establishment "regularly engaged" in providing medical services qualifies as an "institution." *Id.*; Rev. Rul. 69-499, 1969-2 C.B. 39. By "regularly engaged" it is understood that the persons who provide medical care at the establishment devote a substantial portion of their time to doing so in exchange for a consideration determined at arm's length. Rev. Rul. 69-499, 1969-2 C.B. 39. Thus, where a mentally retarded individual was placed in a private home near the hospital from which he had been released, and the couple in the home were paid a significant sum to care for and supervise the patient in accordance with his doctor's instructions so as to facilitate adjustment to community life, the foster home was considered an institution, and amounts paid to maintain the individual were deductible medical expenses. *Id.* at 39-40. The home served as a sort of substitute or nontraditional institution.

A significant case involving a nontraditional "institution" came before the Seventh Circuit which held that a taxpayer's hotel bill, for both food and lodging, constituted a deductible medical expense. *Kelly v. Commissioner,* 440 F.2d 307 (7th Cir. 1971). In *Kelly* a Milwaukee taxpayer while in New York City on business suffered an appendicitis attack, was hospitalized for surgery and developed minor complications. His wife travelled to New York to assist and supervise attendant nurses, and eventually learned to provide the required nursing services. Two and one-half weeks after the operation the surgeon discharged Kelly because the hospital was in need of his room. Nonetheless, the doctor advised the patient not to return to Milwaukee at that time because his wound was still draining and he was too weak to move about without assistance. Kelly left the hospital with the aid of his wife and a licensed practical nurse and spent the following week in a hotel room, leaving it only four times to visit his surgeon. His wife changed his bandages, assisted him in walking and bathing, administered medication, took his temperature, and otherwise provided necessary nursing care. On one occasion a hotel physician was called to the room to deal with the patient's rise in temperature.

Recognizing that the hotel is not "regularly engaged" in providing medical services, the court indicated that it may in any event serve as an "institution" within the meaning of regulation § 1.213-1(e)(1)(v). More importantly, it noted that the primary test of deductibility concerns the condition of the individual and the nature of the services received, rather than the name of the institution. In *Kelly* the taxpayer's condition caused him to stay in the hotel where he could receive continuous daily care in close proximity to his physician after being discharged prematurely from the hospital. Under these circumstances, the

court in *Kelly* held that the hotel bill was a deductible medical expense for care rendered in a substitute institution.[1] A dissenting judge concluded that the hotel was not an institution as defined in the regulation.

The Levines would have us follow the Seventh Circuit majority and recognize the deductibility of the cost of care in a substitute institution which does not fit within the Treasury Regulation's definition of institution. We note, however, that the facts in the substitute institution cases are distinguishable from those in the instant situation in one important detail. Except for a single occasion during the two-year period 1974-1975, Guy did not receive any medical care on the premises which plaintiff taxpayers would have us view as a substitute institution. The apartment had no special medical adaptations and one one physically supervised Guy on a day-to-day basis at the apartment. Hence, the Levines did not incur expenses for care *in* the apartment, whether or not we recognize substitute institutions and whether an apartment may qualify as such. We do not reach the legal issue decided by the Seventh Circuit; in this case the deducted costs were incurred incident to services rendered, but unlike in *Kelly*, the services were not rendered *in* the alleged substitute institution.

Concededly Guy's primary, if not sole, purpose for remaining in Topeka was to continue medically necessary treatment with his psychiatrist. But Congress amended

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1 Similarly, when a son rented his ill, dependent mother a small apartment in the building in which he lived, equipped it, and engaged full-time nursing aid to render care under a doctor's supervision, rent for the apartment was a deductible medical expense. This resulted because the rooms were retained for the purpose of providing better and less expensive medical care on the premises than could be had in a hospital setting, rather than merely for the convenience of the patient's family. *Ungar v. Commissioner*, 22 T.C.M. (CCH) 766, 768-69 (1963).

the statutory definition of medical care in 1954 with the clearly enunciated purpose of cutting back on the deductibility of living expenses incurred while away from home for medical reasons.[2] The 1954 amendment was intended to curtail abuse in the area of medical expense deductions. In the process of remedying previous wrongs, Congress no doubt denied deductions to some deserving taxpayers as well. The legislative history reveals that even this result was forseen and intended, for it indicates that, as an example, living expenses should not be deductible when one with a chronic ailment is ordered by his physician to go to Florida in order to alleviate the injurious effect of an unfavorable climate. *See* note 2, *supra*. If a New Englander with a heart condition must spend two or three months in the South or West in order to survive the winter and Congress does not permit him to deduct his resultant living expenses, it is difficult to see why the Levines should be permitted to deduct Guy's room and

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[2] The deduction permitted for "transportation primarily for and essential to medical care" clarifies existing law in that it specifically excludes deduction of any meals and lodging while away from home receiving medical treatment. For example, if a doctor prescribes that a patient must go to Florida in order to alleviate specific chronic ailments and to escape unfavorable climatic conditions which have proven injurious to the health of the taxpayer, and the travel is prescribed for reasons other than the general improvement of a patient's health, the cost of the patient's transportation to Florida would be deductible but not his living expenses while there. However, if a doctor prescribed an appendectomy and the taxpayer chose to go to Florida for the operation not even his transportation costs would be deductible. The subsection is not intended otherwise to change the existing definitions of medical care, to deny the cost of ordinary ambulance transportation nor to deny the cost of food or lodging provided as part of a hospital bill.

H.R. Rep. No. 1337, 83d Cong., 2d Sess. A60, *reprinted in* 1954 U.S. Code Cong. & Ad. News 4017, 4197; S. Rep. No. 1622, 83d Cong., 2d Sess. 219-20, *reprinted in* 1954 U.S. Code Cong. & Ad. News 4621, 4856.

board in Topeka. If we were to stretch the meaning of the term "institution" so far as to include Guy's living arrangement, it would be difficult to stem the ensuing tide of analogous situations demanding relief clearly not contemplated by Congress. In denying tax relief in the present situation while allowing a deduction for institutional care, we conclude that the fine line of deductibility should be drawn based upon the principle that only those medically necessary away-from-home living arrangements which involve continuous daily medical care on the premises may give rise to favorable tax treatment for the cost of meals and lodging. *See generally Volwiler v. Commissioner,* 57 T.C. 367, 371-72 (1971).[3]

III

Costs incurred for purchasing and insuring a car for plaintiffs' son are also nondeductible. No evidence was introduced which demonstrated that the car provided "transportation primarily for and essential to medical care" as required by the statute, IRC § 213(e), since Guy admittedly also used the car for ordinary personal business. The fact that his doctor recommended that the expenses be incurred in order to foster Guy's independence and thereby aid his recovery, does not render the

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3 In a factual situation virtually identical to the one in this case, Judge Simpson noted that taxpayer's child left the psychiatric hospital not because of overcrowding, as in *Kelly*, or inadequacy, as in *Unger*, but because she no longer needed hospital care. *Volwiler*, 57 T.C. at 372. Thus, the deductibility demarcation we discern above seems reasonable in that it distinguishes cases considered more severe, due to the need for daily hospital or hospital-like care, from those considered less severe, because continuous on-site medical supervision is not required. We are aware of the fact that in some instances an illness which does not call for continuous daily treatment may arouse more empathy than one which does, but it is apparent that Congress intended to use this general rule-of-thumb to accommodate the most often needy cases.

costs *per se* deductible. *See Jacobs v. Commissioner,* 62 T.C. 813, 819 (1974); *Volwiler,* 57 T.C. at 370.

As for attorney Glassman's fees, legal expenses incident to medical care have been allowed as a deduction only when they are "necessary to legitimate a method of medical treatment." *Gerstacker v. Commissioner,* 414 F.2d 448, 453 (6th Cir. 1969). In *Gerstacker* the court allowed a medical expense deduction for legal fees incurred to establish guardianships which were required before the taxpayer's wife could be involuntarily committed for treatment in a mental institution. However, the court would not allow a deduction for fees attributable to services rendered during the term of the guardianship. Glassman's day-to-day management of Guy's affairs was not necessary to legitimate Guy's treatment but, rather, to maintain him during treatment. In fact, plaintiffs themselves state that the attorney's charges were incurred for "supervisory guardianship cares [sic]" and for "non-legal duties." Glassman's fees, as those disallowed in *Gerstacker,* lack "the proximate relationship to the illness . . . required for deductibility," *id. See generally Gerstacker,* 414 F.2d at 450-53.

For the reasons stated the decision of the Tax Court is affirmed in all respects.

WINTER, *Circuit Judge,* concurring in the result:

I have no quarrel with the majority's analysis of the relevant statutory provisions and regulations. As the opinion recognizes, the result we reach is to a degree arbitrary since we deny deductibility to certain expenses which, on this record at least, are unquestionably for

genuine medical purposes. Nevertheless, the statutory and regulatory scheme purposefully denies deductibility apparently because this and similar recurring situations raise factual issues in which the true need for medical care is often difficult to determine. Because both Congress and the appropriate regulatory authorities have decided that the danger to the federal fisc of slippery slope analysis outweighs an ostensibly fairer and more searching approach, we must affirm the Tax Court.

My difference with the majority has to do with its view of the decision of the Seventh Circuit in *Kelly v. Commissioner*, 440 F.2d 307 (7th Cir. 1971). Because I believe that the Levines' expenses for their son's food and lodging are *a fortiori* deductible under the theory of *Kelly*, I write separately. If, on the one hand, we are going to accept the harsh result dictated by the relevant statutory provisions and regulations, we should not create a substantial area of doubt, on the other, by attempting to reconcile our decision with the contrary and more lenient decisions of another circuit.

In *Kelly*, the taxpayer's presence in New York City was a medical necessity resulting from his operation. Because the hospital was overcrowded and Kelly was well enough to recuperate with the assistance of his wife, which amounted only to the care a spouse would administer at home, Kelly was moved to a hotel. The theory of the *Kelly* court was "that [the] taxpayer's condition, the nature of the services he required before he could travel home, and the hospital needs for his room, were the only reasons why he had to pay a hotel for food and lodging." *Id.* at 311.

I believe the Levines' case is stronger so far as the deductibility of expenses for their son's food and lodging is concerned. He faces a medical imperative of living in

Topeka in order to obtain the only suitable treatment for his mental illness. In a perverse departure from the facts in *Kelly*, however, Guy Levine cannot take advantage of the Menninger Clinic's adult apartment living program, for which the expenses would be deductible, *see* IRS Letter Ruling 7714016, [1977] 9 Stand. Fed. Tax Rep. (CCH) ¶ 6950 (Jan. 10, 1977), not because he is too well, but because he is too ill. Thus, he has been forced to lease an apartment in Topeka, much as Kelly took a hotel room in New York, wholly for medical purposes. Indeed, resort to a non-institutional residence was more of a medical necessity in the case of Guy Levine than in the case of Mr. Kelly.

The majority agrees that Kelly's hotel lodging is analogous to Guy Levine's apartment but argues that Kelly's deduction of hotel costs were proper because his wife was present and rendered assistance. This distinction borders on the bizarre in my view. The services were merely spousal care which would have been available wherever Kelly was located and the cost of the hotel room was in no way related to obtaining such care. Moreover, if the assistance provided by Kelly's wife is significant, such a view might arguably render even the expenses of hiring Mr. Glassman deductible since his handling of Guy Levine's daily affairs is a medically necessary function in the case of a person with a partially incapacitating mental illness living in a non-institutional residence.

I would, therefore, reject *Kelly* explicitly. To do otherwise invites taxpayers with weaker cases than that presently before us to litigate the deductibility of similar expenses.

700—12-9-82 • USCA—30298

ORDER DENYING PETITION FOR REHEARING

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

As a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the eighteenth day of January, one thousand nine hundred and eight-three.

IRVING SETH LEVINE and GRACE F. LEVINE
Petitioners-Appellants,

v. No. 82-4035

COMMISSIONER OF INTERNAL REVENUE,
Respondent-Appellee

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the petitioners-appellants, Irving Seth Levine and Grace F. Levine,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge requested that a vote be taken thereon.

U.S. Ct. of Appeals
Filed Jan. 18, 1983
A. Daniel Fusaro, Clerk
2nd Circuit

A. Daniel Fusaro, Clerk
Francis X. Gindhart
FRANCIS X. GINDHART

TAX COURT OPINION

T. C. Memo 1981-437

UNITED STATES TAX COURT

IRVING SETH LEVINE AND GRACE F. LEVINE, Petitioners v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

Docket No. 9634-77 Filed August 17, 1981.

On medical advice Ps moved their son from mental hospital into a private apartment in the vicinity of the hospital. Held, amounts expended to maintain and insure their son's automobile are not deductible medical care expenses. Held further, amounts expended for their son's meals and lodging are not deductible expenses. Held further, amounts expended for a surrogate parent/trustee/advisor for their son are not deductible medical care expenses.

Grace F. Levine, pro se.

Karen M. Martino, for the respondent.

MEMORANDUM FINDINGS OF FACT AND OPINION

EKMAN, Judge: Respondent determined deficiencies in taxpayers' Federal income taxes in the amounts of $3,670 and $5,551 for the years 1974 and 1975 respectively. Due to concessions by the parties, the issues remaining for decisions are (1) whether amounts expended by petitioners in maintaining and insuring their son's automobile are deductible as medical expenses, (2) whether the amounts expended by petitioners for their son's meals and lodgings while the son was an outpatient at a mental health clinic are deductible as medical expenses, and (3) whether fees paid by petitioners to a "surrogate parent/trustee/advisor" to assist their son in day-to-day activities are deductible as medical expenses.

FINDINGS OF FACT

Some of the facts have been stipulated and are so found. The stipulation of facts and exhibits

attached thereto are incorporated herein by this reference.

Petitioners, Irving Seth Levine and Grace F. Levine, husband and wife, resided in New York, New York, at the time they filed their petition herein. They timely filed their joint Federal income tax returns for 1974 and 1975 with the Internal Revenue Service Center in Cincinnati, Ohio.

Petitioners' son, Guy, was born in 1955. Guy suffers from a mental condition in which he has problems maintaining adequate contact with reality. In March 1969, Guy was admitted to the Menninger Clinic (hereinafter Menninger) in Topeka, Kansas, as an inpatient. Guy remained an inpatient in the Children's Hospital at Menninger until February 1973, at which time other arrangements had to be made because Guy was approaching the maximum age level for inpatient status at the Children's Hospital.

Guy was initially discharged from the Children's Hospital into a family care home which provided him

with living arrangements, case work services, and public school enrollment. Guy also continued individual psychotherapy on an outpatient basis.

The family care home arrangement lasted only about one month. The pressure of living outside the hospital and attending public school on a full-time basis proved too much for Guy, and he had to be temporarily rehospitalized.

Other treatment alternatives were explored. The Children's Hospital program was no longer available to Guy, and Guy himself was adamant about wanting to get out of a mental institution. Menninger contacted several other residential centers but these other centers were unwilling to accept Guy for further treatment, and Guy was unwilling to consider other institutions as a source of placement. In 1974 and 1975 there were no other places available to Menninger which would accept Guy as a patient and which Guy would accept as a

treatment facility. In the opinion of Guy's psychotherapist, it was medically and psychiatrically essential that Guy remain in Topeka in the years at issue. The medical personnel at Menninger believed that Guy's relationship with his psychotherapist was not reproducible elsewhere.

About the only other alternative available was to have Guy move into the community, share an apartment with another former hospital inpatient,[1] and sever further contact with Menninger's inpatient treatment program. Guy would continue individual psychotherapy on an outpatient basis, and the hospital facitilies of

Menninger as a whole would continue to be available to him, but he would no longer be an inpatient in the hospital.

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[1] Footnotes appear at end of document.

At the time Guy was discharged from the Children's Hospital at Menninger, the Children's Hospital had no apartment living plan. Guy would not have been accepted into the Adult Hospital's apartment living program because that program required a degree of self-suffiency which Guy did not possess.

In order for Guy to be treated, a unique situation was created with the assistance of petitioners and Arthur Glassman. The Menninger Social Work Department did not assist in creating this unique living environment for Guy because it did not have the time and in Guy's mind it was associated with the entire hospital treatment program which Guy very much wanted to leave.

Petitioners rented a furnished efficiency-type apartment for Guy.[2] The apartment had a small kitchen, a living area, a bathroom, and a small

bedroom. The apartment had no special medical furnishings of any type, but medical treatment was provided to Guy at his apartment on at least one occasion by his psychotherapist. Guy had difficulty maintaining personal hygiene and keeping his apartment clean. On at least two occasions Guy was threatened with eviction because his apartment was not kept properly cleaned. No one connected with Menninger physically supervised Guy on a day-to-day basis at the apartment, nor did anyone else.

Arthur Glassman (hereinafter Glassman) is a Topeka attorney who was approached by petitioners and retained by them to serve as a surrogate parent/social service worker/lawyer to help Guy manage his day-to-day affairs. Glassman worked through some problems with Guy's apartment manager, handled various matters pertaining to Guy's insurance, handled various problems Guy encountered with the telephone company, procured employment

for Guy, assisted Guy in regulating the purchase of clothes, medical prescriptions, and auto repairs. Glassman also paid Guy's rent, telephone, and utility bills and paid for a cleaning woman out of funds sent by petitioners. During the years at issue Glassman would meet with Guy no less than once a week.

Once Guy became an outpatient, hospital transportation was no longer available to him. He therefore required transportation in and around Topeka, and a car was purchased for him to meet his transportation needs. Guy had been enrolled in a driver's education course at the request of Menninger as a part of the plans to prepare him to move out of the hospital and into the community. According to his psychotherapist, Guy has a long-standing need for independence and the car was a symbol of independence. Guy used the care not only to transport himself to and from appointments at Menninger but also to perform tasks such as grocery shopping.

OPINION

Section 213(a), I.R.C. 1954, allows as a deduction expenses paid during the taxable year for the medical care of the taxpayer, his spouse, and dependents if such expenses exceed 3 percent of taxpayer's adjusted gross income and are not compensated for by insurance or otherwise.

"Medical care" encompasses amounts paid for the diagnosis, cure, mitigation, treatment, or prevention of disease, or for the purpose of affecting any structure or function of the body; for transportation primarily for and essential to medical care; and for insurance covering medical care. Section 213(e)(1).

The first issue for our consideration is whether amounts expended for maintaining and insuring Guy's automobile are deductive medical expenses. This must be decided in favor of respondent. The burden of proof is upon petitioners. Rule 142, Tax Court

Rules of Practice and Procedure. They have failed to show the automobile was used primarily for medical care. The facts that the Menninger staff initiated the driver's education course and that ownership of an automobile was an important independence symbol to Guy do not establish the automobile expense as a deductible medical care expense. A doctor's recommendation that an expense be incurred does not render that expense ipso facto deductible. Volwiler v. Commissioner, 57 T.C. 367 (1971); Havey v. Commissioner, 12 T.C. 409 (1949). While owning an automobile may have been beneficial to Guy and may have enabled him to reach Menninger rapidly should an emergency arise, the automobile was also used to transport Guy on his personal errands. Petitioners have not established the automobile was "primarily for and essential to" medical care, which is the touchstone for deductibility of transportation expenses under section 213.

Whether amounts expended for Guy's meals and lodging are deductible as medical care expenses presents a much more difficult problem. Generally expenses for meals and lodging are non-deductible personal, living, or family expenses. Section 262. However, the cost of inpatient hospital care, including the cost of meals and lodging, is an expenditure for medical care. Section 1.213-1 (e) (1) (v), Income Tax Regs.

Moreover, in certain instances expenses for care in an institution other than a hospital will qualify as expenses for care; the extent to which such expenses will qualify is primarily a question of fact which depends upon the condition of the individual and the nature of the services he receives (rather than the nature of the institution). Section 1.213-1 (e) (1) (v) (a) and (b), Income Tax Regs.[3] The basic controversy between petitioners and respondent involves whether Guy's apartment is an institution within the meaning of section 1.213-1 (e) (1) (v), Income Tax Regs.

Respondent urges that Guy's apartment was not specially equipped or furnished in any manner, no medical care or supervision was regularly provided to Guy at his apartment, and the availability of medical care was not a consideration in choosing Guy's apartment.

Petitioners counter that Guy's relationship with his treating psychotherapist was not reproducible elsewhere; Guy's living arrangements became, in fact, part of the treatment plan; and, therefore, Guy's apartment was a therapeutic setting, a type of substitute hospital.

While we can sympathize with petitioners' situation, the weight of authority supports respondent's position. The factual scenario here is quite similar to that in Volwiler v. Commissioner, supra. In Volwiler petitioners' daughter had been hospitalized two years for a mental disorder. Upon her release her psychiatrist wanted her to live in a

"halfway house," but there were no such halfway houses available in the vicinity. Consequently, the psychiatrist, daughter, and parents set about "constructing" a halfway house. First a room in a boarding house and then an apartment were rented for the daughter, and the parents deducted the amounts they contributed towards rent as a medical care deduction, claiming the boarding house and apartment were institutions in lieu of a halfway house. In denying the deduction we said:

> Whether the costs of remaining in an institution are deductible medical expenses depends upon the condition of the patient and the services furnished by the institution. The costs of lodging in such an institution are deductible only when the principal reason for the patient being at the institution is because of the medical care which it provides for him. Sec. 1.213-1 (e) (1) (v), Income Tax Regs. The question, therefore, becomes whether the lodging provided at the boarding house and the apartment can qualify as a medical expense under such rules.
> We cannot distinguish Susan's living in either the boarding house or the apartment from her living in any personal residence. The facilities were neither specially equipped nor specially furnished. There was no medical supervision

> provided to Susan and neither the boarding house nor the apartment engaged regularly in providing medical care. Althought living in the facilities might have been beneficial to Susan, such benefit is not sufficient to make the lodging part of the institutional medical care. (Volwiler v. Commissioner, supra at 371.)

The evidence presented establishes that Guy's apartment was not specially equipped or furnished; he received no regualr therapy, medical care, or supervision of any type at the apartment. Guy's apartment was no different from any other personal residence.

Petitioners place heavy reliance on Kelly v. Commissioner, 440 F.2d 307 (7th Cir. 1971), revg. a Memorandum Opinion of this Court, but such reliance is misplaced. In Kelly, taxpayer, away from home on a business trip, had emergency surgery and developed complications. Due to a shortage of hospital space, taxpayer was discharged from the hospital but advised not to return home. Taxpayer was allowed as

a medical deduction expenses incurred for meals and hotel lodging during the period between his hospital release and the time he was allowed to return home. During the week taxpayer recuperated in the hotel, he only left the room to visit his surgeon; he was under the constant supervision of his wife who changed his bandages, assisted him in walking and bathing, and administered his medication. While taxpayer's wife was not specially trained as a nurse, she did render nursing services to him. Taxpayer's only reason for remaining in the hotel was the shortage of hospital space in combination with his inability to travel.

Petitioner's son, Guy, has received no comparable services at his apartment. He is free to come and go at will, and aside from a few hours each week when he is actually in therapy sessions, he is under no supervision whatever. Nor are medical services offered to Guy at his apartment.

Section 1.213-1 (e) (1) (ii), Income Tax Regs., requires that medical care expense deductions be confined strictly to expenses incurred primarily for the prevention or alleviation of a physical or mental defect or illness. The expenses incurred for meals and lodging in a private apartment simply do not meet this test. Guy would require shelter and food regardless of where he lived.

In Jacob v. Commissioner. 62 T.C. 813 (1974), we were asked to determine whether the cost of procuring a divorce which action was "prescribed" by taxpayer's psychiatrist was a deductible medical care expenditure or a nondeductible personal expenditure. As we said in Jacobs v. Commissioner, supra at 819:

> One important condition, which petitioner must satisfy if his claim is to succeed, is whether the expenditure would have been made even if there had been no illness. This "but for" test requires petitioner to prove both that the expenditures were an essential element of treatment and that they would not have otherwise been incurred for nonmedical reasons.

Clearly Guy's meals and lodging expenses would have been incurred regardless of whether he was receiving psychotherapy treatment. Deductions are a matter of legislative grace. New Colonial Ice Co., Inc. v. Helvering, 292 U.S. 435 (1934). Petitioners have failed to bring themselves within section 1.213-1 (e) (1) (v) (a), Income Tax Regs. The availability of medical care in Guy's apartment is not the principal reason for his presence there.

In enacting section 213, Congress authorized deductions for only certain medical care expenses, not all medical care expenses. While we realize petitioners, as concerned parents, are doing everything within their power to facilitate an eventual cure for their son, the expenses which they seek to deduct do not come within the scope of those authorized by Congress. The Volwiler decision has been of record for nearly 10 years now. If Congress wished to abrogate that decision, it certainly could

have done so. We find Volwiler indistinguishable from the case at issue and, consequently, must find that expenses incurred for Guy's meals and lodging are not deductible.

We might add that there is no evidence in the record to indicate the cost of Guy's meals and loding was more expensive due to his medical condition than the cost of a healthy person's meals and lodging. A medical care expense which increases the cost of a personal expense may be deductible to the extent that the medical care expense exceeds the normal expense.[4] From the evidence presented here there is no indication that any of Guy's expenses were greater or that they were other than personal living expenses. They are, accordingly, nondeductible.

The final issue for our decision is whether fees paid by petitioner to Glassman for his assistance to their son in day-to-day activities are a deductible medical care expense.

Legal expenses incident to medical care have been allowed as a medical deduction in the past where the legal expenses were "necessary to legitimate a method of medical treatment". Gerstacker v. Commissioner, 414 F. 2d 448, 453 (6th Cir. 1969), revg. 49 T.C.522 (1968). In Gerstacker taxpayer was allowed to deduct as a medical care expense legal fees incurred in establishing guardianships which were required before taxpayer's wife could be involuntarily committed to a mental hospital. However, only fees necessary to the guardianship proceedings were deductible; no deduction was allowed for fees attributable to services rendered during the guardianship.

Glassman was hired by petitioners to act as a surrogate parent, social service worker, lawyer. His role was to help Guy manage his day-to-day affairs. While Glassman's activities may have been invaluable to Guy, such activities were not "necessary to

legitimate a method of medical treatment." Gerstacker's expenses were incurred because his wife could not be compulsorily confined to the mental hospital without the requisite guardianship proceedings. The fees paid to Glassman are not essentially bound up with Guy's medical care as were the guardianship fees. We cannot find that the fees paid to Glassman were incurred primarily for the prevention or alleviation of a physical or mental defects or illness as required by section 1.213-1 (e) (1) (ii), Income Tax Regs.

In summary then, petitioners may not deduct as medical care expenses amounts expended to maintain and insure their son's automobile, amounts expended for their son's meals and lodging, or amounts expended for a surrogate parent/trustee/ advisor for their son. However, due to concessions made by the parties prior to trial,

Decision will be entered under Rule 155

FOOTNOTES

1 This apartment sharing lasted not more than one month. For the years with which we are concerned, Guy was generally living in an apartment by himself because he was unable to have little more than very superficial social contacts with other people.

2 Although the record is unclear as to when exactly the apartment was rented, Guy was living by himself in the apartment at some time in 1973 and during all of 1974 and 1975, the taxable years in issue.

3 Sec. 1.213-1(e)(1)(v), Income Tax Regs., provides the following rules for determining when expenses for care in an institution other than a hospital will constitute medical care:

(a)Where an individual is in an institution because his condition is such that the availability of medical care (as defined in subdivisions (i) and (ii) of this subparagraph) in such institution is a principal reason for his presence there, and meals and lodging are furnished as a necessary incident to such care, the entire cost of medical care and meals and lodging at the institution, which are furnished while the individual requires continual medical care, shall constitue an expense for medical care. * * *

(b)Where an individual is in an institution, and his condition is such that the availability of medical care in such institution is not a principal reason for his presence there, only that part of the cost of care in the institution as is attributable to medical care (as defined in subdivisions (i) and (ii) of this subparagraph) shall be considered as a cost of medical care; meals and lodging at the institution in such a case are not considered a cost of medical care for purposes of this section. * * *

[4] E.g., Randolph v. Commissioner, 67 T.C. 481 (1976) (excess of cost of chemically uncontaminated food purchased in health food stores over cost of similar chemically treated food found in ordinary grocery stores deductible); Cohn v. Commissioner, 38 T.C. 387 (1962) (additional charge made by restaurants to prepare salt-free meals deductible); Rev. Rul. 75-318, 1975-2 C.B. 88 (excess of cost of braille books and magazines over cost of regular printed editions deductible).

TAX COURT DECISION

UNITED STATES TAX COURT

IRVING SETH LEVINE and GRACE F. LEVINE	)	
Petitioners	)	Docket No. 9634-77
v.	)	
COMMISSIONER OF INTERNAL REVENUE	)	
Respondent	)	

DECISION

Pursuant to the opinion of the Court filed August 17, 1981, and incorporating herein the facts recited in the respondent's computation as the findings of the Court, it is

ORDERED AND DECIDED: That there are deficiencies in income tax due from the petitioners for the taxable years 1974 and 1975 in the amounts of $3,670.00 and $5,551.00, respectively.

(Signed) Sheldon V. Ekman

Judge.

Entered: Oct. 21, 1981

It is hereby stipulated that the foregoing decision is in accordance with the opinion of the Court and the respondent's computation, and that the Court may enter this declsion.

KENNETH W. GIDEON
Chief Counsel
Internal Revenue Service

Irving Seth Levine
SETH LEVINE
Wayside Lane
P.O. Box 84
West Redding,
CT 06896
Telephone No.
203-938-9367

By: (Sgd) H. Stephen Kesselman Oct 14, 1981
H. STEPHEN KESSELMAN
District Counsel
Internal Revenue Service
Leo W. O'Brien Federal Building
Clinton Avenue & N. Pearl Street
Albany, New York 12207
Telephone No. 518-472-36

Grace F. Levine
GRACE F. LEVINE
Petitioner
Wayside Lane
P.O. Box 84
West Redding, CT 06896
Telephone No. 203-938-9367

DEPOSITION OF DR. ERWIN T. JANSSEN

AFFIDAVIT

I, ERWIN T. JANSSEN, certified that I have read my deposition which was taken on January 20, 1981, in the case of Levine, et al., vs. Commissioner of Internal Revenue, and request that the following changes be made:

PAGE	LINE	CHANGE FROM	TO	REASON
14	25	Intern	Internist	Clarification
15	4	Reed	Reid	Spelling
30	21	Reed	Reid	Spelling
38	14	Add: This statement is a general one. For Guy specifically, once he was admitted to The Menninger Foundation for treatment, it was imperative that he continue here for the sake of continuity.		Clarification
39	4	Strike don't		Clarification of meaning and emphasis.

STATE OF KANSAS)
) ss.
COUNTY OF SHAWNEE)

Erwin T. Janssen M.D.
ERWIN T. JANSSEN, M.D.

I, Betty Nelson, a Notary Public in and for the County of Shawnee, and State of Kansas, do hereby certify that on the 23 day of January, 1981, the witness, Erwin T. Janssen, M.D., having been duly sworn on his oath stated that he had read the foregoing deposition in the foregoing case and requests that the above changed be made, signed his deposition before me, and his said deposition is now herewith returned.

Betty Nelson
Notary Public

My appointment expires March 12, 1981

IN THE UNITED STATES DISTRICT COURT
TAX COURT

IRVING SETH LEVINE and GRACE F. LEVINE Petitioner,	)	
vs.	)	Docket 9634-77
COMMISSIONER OF INTERNAL REVENUE, Respondent.	)	

DEPOSITION

OF

ERWIN T. JANSSEN, M. D.,

taken on behalf of the Petitioners, pursuant to Court Order beginning at 11:14 a.m., on the 20th day of January, 1981, in the law offices of Sloan, Listrom, Eisenbarth, Sloan and Glassman, 714 Capitol Federal Building, City of Topeka, County of Shawnee, and State of Kansas, before Eleonora M. Lyon, Certified Shorthand Reporter, and before H. Kent Hollins, Attorney at Law, officer before whom the deposition is taken.

APPEARANCES

The Petitioners appeared in person and by counsel, Mrs. Grace F. Levine, appearing pro se Wayside Lane, P.O. Box 84, West Redding, Connecticut, 06896.

The Respondent appeared by and through its counsel, Mr. Michael Bowman, General Counsel, Internal Revenue Service, 2700 Federal Building, 911 Walnut, Kansas City, Missouri, 64106.

The officer before whom the deposition was taken, Mr. H. Kent Hollins, Attorney at Law, 3401 Southwest Harrison, Topeka, Kansas, 66611.

ERWIN T. JANSSEN, M.D.

called as a witness on behalf of the Petitioners, was sworn by Mr. Hollins, and testified as follows:

DIRECT-EXAMINATION

BY MRS. LEVINE:

Q. Would you give you full name and your address for the record please?

A. Erwin T. Janssen, M.D., Menninger Foundation, Box 829, Topeka, Kansas, 66601.

Q. And what is your position with the Menninger Foundation?

A. I am Director of the Children's Division.

Q. And how long have you been Director of the Children's Division?

A. Since August of 1978.

Q. And before that from July '77 to August of '78, you were---

A. I was the interim director of the Children's Division.

Q. And from 1968 to 1977, were you with the Menninger Clinic?

A. I came in 1968 for training and was on staff from 1973 on.

Q. Now you graduated from medical school?

A. Yes, ma'am, from the University of Iowa, 1962.

Q. And you had a medical internship?

A. Yes, ma'am, at Harborview Hospital in Seattle, Washington, King County Hospital.

Q. You came to the Menninger Clinic in 1968 for training?

A. Yes, ma'am.

Q. And you stayed how long?

A. I completed my training in '73.

Q. And you've remained continuously on the staff.

A. I remained continuously on the staff.

Q. You've been with the Menninger clinic since 1968 starting with your training program and remaining today where you are now Director of the Children's Division.

A. Yes, ma'am.

Q. Now in addition to the medical school graduation in 1962, you graduated from the Menninger School of Psychiatry.

A. Yes, ma'am.

Q. And did you also graduate from another Menninger program?

A. I graduated from--- the Menninger School of Psychiatry has two separate parts, one for the adult training which was finished in 1971; and I continued on in training of child and adolescent psychiatry and graduated in 1973.

A. Do you have a Menninger speciality in treating children, adolescents?

Q. Yes, ma'am.

Now as the Director of the Children's Hospital, what are your responsibilities?

A. I'm basically responsible for the clinical work done by our staff within the Children's Division.

Q. Did there come a time when you started to treat Guy Levine?

A. Yes. I started initially with him in April of 1975.

Q. And you have been treating him in medical and psychiatric areas not encompassed by Doctor Norris?

A. Yes, ma'am.

Q. And are you personally familiar with Guy's illness?

A. Yes, to the extent of my treatment process.

Q. And with the type of treatment he's received?

A. Yes, I feel so.

Q. And do you also have an opinion of what is requisite for his continuing care?

A. Yes.

Q. And in your capacity as Director of the Children's Division, do you have access to all of Guy's Menninger Clinic records?

A. Yes, I do.

Q. Past and present?

A. Yes.

Q. Is it your medical judgment and opinion that Guy should have remained in Topeka during the years 1974, 1975?

A. Yes, ma'am.

Q. On what do you base this opinion?

A. In review of the record at that time, although I was not involved with him at the time of his discharge, the question came up as to what would be most appropirate for him considering he at that time had reached the maximum benefit of the Children's Division hospitalization and his treatment with Doctor Norris was the one viable treatment contact that seemed to have meaning for Guy and to maintain that, he obviously had to be in Topeka.

Q. Was---

MR. BOWMAN: Okay. Let me interject an objection here to his opinion being based on

medical records and not from personal opinion, and therefore I'd object to the testimony as one of hearsay. You may continue.

Q. (BY MRS. LEVINE) You had personal contact with Guy in '75. Is that right?

A. Yes.

Q. Based on your personal contact, is it your opinion that a break in treatment could result in any--well, strike that. Let me rephrase the question, please. Strike that whole question. Based on your personal observation and contacts with Guy Levine since April 1975, in your opinion what would transpire if there were a break in treatment.

A. My feeling that if there would be a disruption, and to that extent a termination of treatment, it would have taken Guy a good deal of time to re-establish himself in the treatment process because of the delicate and I think precarious situation he has had with his relationships with

people, especially treaters; and he is not one to do that easily because of the psychopathology.

Q. How would this affect his ability to function if at all?

A. I would estimate that he would have periods of regression that would be quite intense and that would require re-hospitalization from time to time.

Q. That's if there were a break.

A. If there were a break.

Q. A break meaning if he left Topeka.

A. If he left Topeka for any length of time.

Q. And how would that affect his withdrawal symptoms?

A. Again, I would estimate on the clinical basis that withdrawal is one of the ways he has of maintaining himself, and withdrawal would be a regular part of his existence.

Q. And how would it affect his overall symptoms?

A. I would estimate that he would typically show not only the withdrawal, away from people and more into himself, but the active fantasy; and to that extent, the hallucinatory type of activity would increase.

Q. How would you characterize that in medical terms?

A. That he would be involved in regression?

Q. Yes, and?

A. I think to that extent, he would show a gradual deterioration of his personality with the other things that go along with that, including his ability to care for himself, manage, maintain himself. Even the simple issues of daily living become monumental tasks for him, hygiene, cleanliness, physical health care. I would guess other seemingly simple social activities such as maintenance of money, leisure time, all of that fails.

Q. All of that fails if he were to leave Topeka and break his associations with---

A. I would say he would regress, and those are the issues of the part of the regression that he would have.

Q. In your judgement then, is it essential that he stayed in Topeka?

A. It's my judgment that through this time that Topeka represented the best possibility that Guy could have had for a treatment process.

Q. And Guy's remaining in Topeka represents continuous care and treatment?

A. That's how I see it, especially that relationship that Doctor Norris was able to maintain as difficult as that was over these years.

Q. Is it your opinion that the relationship with Doctor Norris could have been reproducible somewhere else?

A. I don't think so.

Q. In other words, you're saying it is not reproducible.

A. That's my personal impression. That relationship could not have been reproduced for Guy.

Q. Anywhere else but Topeka.

A. Yes.

Q. And your view of that relationship is such that you feel how about it?

A. It seems to me as I viewed the clinical process, that that was the thread that Guy had to the issues of reality and literally to continued maturation.

Q. Could we use the word "crucial" with respect to that relationship?

A. Yes.

Q. Mr. BOWMAN: Well, please let the witness use his own words.

A. (BY MRS. LEVINE) How would you characterize that relationship?

Q. Well, if "crucial" is taken away---

MR. BOWMAN: I don't object to the use of the word "crucial" as long as it's your testimony

and not the attorney's.

A. It seems to me if you put this in the context of the growth and maturation experiences I do as a psychiatrist that without that thread to someone - actually it would be stronger than thread but that is what Doctor Norris has represented to Guy these years - that future maturation would be essentially inhibited or completely stopped and he in that sense becomes life-giving as well as life-saving process for the psychological self.

Q. (BY MRS. LEVINE) Now do you consider then that Topeka is one of my many options?

A. Well, for Guy's situation I feel that by virtue of what we have here, not only at the Menninger Foundation and the services provided there but for Guy's other personal physical medical needs, the example I think is well based on what eventually came. This gets away from '74, '75; but with the problem he had with his retinal detachment,

I think without the psychological support during that rather major insult to his vision, he would have had a psychotic break of major proportaions. And I think he generally made use of the support that we were able to give him during that time.

Q. Are you saying then, Doctor Janssen, that not only is Doctor Norris essential therapeutically but that the medical staff of the Menninger Clinic, which is also psychiatrically oriented, are essential for Guy's well-being?

A. That's my feeling. Guy is---that's my feeling.

Q. And that as a concrete example of that, you're giving his recent illness where he had a detached retina?

A. Yes, ma'am.

Q. And you have just testified that if it had not been for his presence in Topeka and for the availability of the psychiatrically oriented medical

staff of the Menninger Clinic, Guy could not have been operated on?

MR. BOWMAN: Hold on just a second.

MRS. LEVINE: He just testified to that.

MR. BOWMAN: Well, then let his testimony stand. I really have to object to your taking his testimony, recharacterizing it, and parroting to him for him to agree to. I think his testimony is adequate. As a matter of fact the only testimony that should be in front of the court. Thank you.

A. I'm guessing, in reaction to that, his ability to psychologically manage that surgery I think it would have had been done regardless by virtue of saving the sight. I think that fact that he made it through there, through that surgical experience, without a major psychiatric breakdown is a credit to his growing strength and I think also a credit to the support system that he be trusted here in Topeka.

Q. (BY MRS. LEVINE) Now is the doctor who operated on his eye attached to the Menninger

staff?

A. Doctor Kovarik is a consultant as we have other consultants from the medical community available to our patients.

Q. In your experience has Guy made use of these Menninger Clinic facilities that are available to him?

A. Guy is dependant upon our facilities for his total medical psychiatric care. Not only that--- well, as to medical care he has made use of our internists that are part of our organization, Doctor Muceno, Doctor Cochran. As internists we rely on them for the medical aspects of it. He has made use of one of our local hospitals, Stormont-Vail, because I hospitalized him there under an emergency situation. So we've made use of our general hospital as well as our specific medical specialists at the Menninger Foundation.

Q. Has he also made use of Doctor Sargent?

A. I don't remember whether it was Doctor Sargent or Doctor Cochran who helped attend at Stormont. Doctor Sargent is another one of our interns.

Q. And has he also been seen by a psychiatrist in addition to you and Doctor Morris?

A. I've had psychiatrists cover for me when I have been out of town, and Doctor David Reid, who is one of our psychiatrists in the Children's Division, and Doctor Ed Levy, when he was with us as a staff member, covered for me; and both of them had seen Guy on one occasion.

Q. Can you explain, Doctor Janssen, why Guy is not now in one of the aftercare facilities that's provided by Children's Hospital, or wasn't then in '74, and '75?

A. The aftercare facility was an opportunity for some follow-up care. It requires a high degree of activity on the part of the individual, and Guy at that

point was not able even to consider being involved that way. Groups were terrifying to him, and he backed out from the application process that I attempted to arrange at one point on that basis, and he never made it.

Q. How would you characterize that then as a--would you characterize it then as being too ill to join a group home? How would you characterize that?

A. I think the level of his pathology or illness and the level of his personality strengths were simply not up to the intensity of what a group home or aftercare program was able to provide.

Q. When Guy was discharged in 1973, did the Menninger Clinic sanction Guy's discharge?

A. Yes, ma'am.

Q. And did the Menninger clinic sanction his going to live in an apartment?

A. Yes.

Q. And did the Menninger Clinic ask the parents to participate in this?

A. Yes. As a part of our work, we feel that the family as well as the individual should be as responsible for themselves as possible; and rather than make those arrangements, we typically ask the individual if they're able, which Guy was not, or the family to do that as a part of the treatment program.

MR. BOWMAN: I'd like to interject an objection here. He's testified that he never had any contact with Guy Levine until April of 1975, so his testimony as to what happened in 1973 is either based on what somebody else told him, hearsay, or based upon speculation, neither of which is admissible.

MRS. LEVINE: Well, Doctor Janssen has testified that he has complete access to the-- all the medical records as director of the hospital, and he has also testified that he's been working with them since 1975, so that putting those two facts back-to-

back, he's not operating as an individual person. He's operating as a member of the staff of the Menninger Clinic; and in order to operate as a member of the staff of the Menninger Clinic, he must be dealing with someone who has patient status of some kind with the hospital.

MR. BOWMAN: Well, there's no foundation for this testimony as to how he has this knowledge, so you can speculate or I can speculate but there's still no foundation.

MRS. LEVINE: All right.

Q. (BY MRS. LEVINE) How do you know, Doctor Janssen, that Menninger Clinic sanctioned Guy's discharge?

A. I have access to the discharge note, discharge records, discharge summary.

Q. And have you looked at that recently?

A. Yes, ma'am, I looked at it last evening.

MR. BOWMAN: Okay, I object to his testimony not being the best evidence of the medical

records. The best evidence of the medical records are the medical records.

Q. (BY MRS. LEVINE) There's no question that Guy was discharged from the Menninger Clinic in 1973?

A. No, ma'am.

Q. And as Menninger policy, are parents and family involved in situations where there is no Menninger staff to perform the function or even sometimes if there is?

A. To have family involved is a matter of our clinical practice.

Q. So that if Guy's family were involved in setting him up in the community, that would be consistent with Menninger practice---

A. Yes, ma'am.

Q. -- as you know it?

A. Yes.

Q. Do you know that Guy was given driving

instruction by the Menninger Clinic-- at the initiation of the Menninger Clinic?

A. No, I'm not sure that I knew that was the case. I knew that he had been checked by our physicians regarding the typical application for driver's license, but I don't know about the initiation of the experience itself.

Q. Your physicians checked him out medically for---

A. That's my impression of the record, yes.

Q. Now in your opinion---

MR. BOWMAN: Then you don't know that from personal knowledge.

DOCTOR JANSSEN: I did not check him out personally.

MR. BOWMAN: Objection. There's no foundation, it's hearsay.

Q. (BY MRS. LEVINE) Is there in your opinion any psychiatric inconsistencies in Guy's driving an automobile and his emotional problems?

A. Well, the psychological problems in and of themselves do not make him a danger to himself or others in the management of an automobile. So to that extent, he wouldn't be putting himself or others in a position of danger simply by virtue of his psychological problem.

Q. Would you say that his emotional problems are deep-seated?

A. Yes, ma'am.

Q. And, nevertheless, he's responsible to drive?

A. At the points that I have seen him personally, yes.

Q. And in your opinion, for what purpose was he given driving instruction while an inpatient at the Menninger clinic?

MR. BOWMAN: If he knows.

A. Well, I guess I have an opinion of the advantage for him, simply in coming to see me

personally. He needs independence of others as much as possible, and that would be one of the efforts of treatment eventually to provide that independence and certainly for him to be available for treatment. It's a tremendous advantage for him to be able to drive. Now, if that is related to why he was originally given lessons, I don't know.

Q. (BY MRS. LEVINE) But in your opinion now, this is the importance of---

A. It was when I was seeing him.

Q. And in your knowledge, do you know whether he actually used the car this way, he came to see you and to see other people?

A. As far as I know he did. There were times when personally-- since he would see me late in the afternoon that we would leave the office together and he always got in a car, I'm assuming it was his, and drove away.

Q. In your opinion, is it essential that he have this mobility?

A. I will simply restate my position that I mentioned a moment ago, that Guy's need for independence is certainly long-standing, and the car represents that to him like it does to all of us.

Q. Are you saying then that it can be considered in your opinion as a part of the therapeutic set-up?

A. I think in a very broad way it becomes a symbol for independence that he would not have if the he were dependent upon other people at that point, in my work with him.

Q. And what about his access to the Menninger facilities?

A. Well, considering if that is Doctor Norris's practice and what I practice, he has to meet with us if he is going to receive treatment; and he needs to meet with us if he's going to receive treatment.

Q. Would you say that the— how would you characterize the continuity of care provided by

yourself and Doctor Norris and the Menninger complex with respect to Guy's emotional condition?

A. Well, with an obvious built-in bias, I feel that the care that we can provide at the Menninger Foundation is of high quality and, again for Guy's benefit, has been an extremely important part of his maturation experience, treatment experience.

Q. Do you know where Guy is now?

A. Well, I know that he is hospitalized in the short-term diagnostic treatment unit of the Menninger Foundation.

Q. He is now inpatient?

A. He is now an inpatient, yes, ma'am.

Q. How would you characterize that hospitalization? As a step forward or a step backward?

A. Well, I would see it as an important next step in the-- step upward in his ove-all maturation process. In the last years that I have been working

with him, any number of times I have encouraged him to think of this. I had hoped that he could take this step by himself. At one point I was ready to insist that he take it; but realizing that he could not be forced into that, I feel that for him to come and ask me personally to arrange for this hospitalization was indeed a step forward for Guy.

Q. In your opinion would this have been, this forward step, impossible without the years that preceded it?

A. I don't see that-- that it could have been. I think those were years of personal struggle in which he literally came to that decision, albeit over the many months, by himself; forcing this on him could not have had the same result as his requesting and wanting it.

Q. Then how would you evaluate this setting that Guy was in in the community, the apartment, Mr. Glassman, and the contact with the Menninger Clinic.

A. Well, I feel that my own work with Guy was a part of the underpinning, or foundation, of what I hope can be a continued treatment process now; and to that extent as a prelude or another episode, he plateaued at that point; and now I think he has a chance to be on the move again, psychologically speaking.

Q. Yes. Now how would you characterize the living arrangements in the community, the apartment, Mr. Glassman, and the support from the Menninger Clinic. Would you characterize that as a therapeutic living environment?

A. Not having actually seen his living environment, I can't comment on the apartment.

Q. I don't mean the phyical aspects. I mean the emotional.

A. For the psychological treatment to proceed, we need a certain level of support so that Guy can be available; and there were times during

the time I've attended him that without that kind of active support, I could not in any way see he would be able to manage money. I have never helped him with that so I do not know what that must have been like. but for him to even make appointments on time were difficult and at times he was very prompt and regular. Other times when he was more regressed, he would forget appointments. And to the extent of meeting that kind of support in the community was a support to the treatment process. I don't know what else to say.

Q. Now I am going to ask you a hypothetical question, Doctor Janssen. You are a medical doctor.

A. Yes, ma'am.

Q. Medically and psychiatrically I'm going to ask to explain the difference, if any, between Mr. Jones of Connecticut going to Houston to see Doctor DeBakey for what my be a unique heart operation, who has to stay in a hotel, say, for two or three

weeks or even a month and the living arrangements made for a psychiatric patient such as Guy Levine to live in the community.

A. The nature of a psychiatric treatment process often implies a focus on the person's ability to manage living, organizing one's time one's person that I think differentiates psychiatric treatment to some extent from a typically medical technical aspect. Indeed, part of the reason that we have social work support for our work with individuals exemplifies the importance of that type of support system for the treatment. That is not at the same level for most medical surgical areas because the person psychologically and mentally is able to do that for himself. And in your hypothetical situation, a post surgical cardiac situation, they are able to manage for themselves outside of the hospital at a different level generally than many psychiatric patients can. I think again our follow-up programs

that we have at the Menninger Foundation exemplify our concern that there be a gradual transition from hospital care to external independence that is often not the case in, let's say, the cardiac situation.

Q. Would it be fair to say that the patient's living environment is part of his treatment?

A. Yes, that's very much the case for the hospital and I think very much the case for treatment outside of the hospital.

Q. Could you characterize Guy's living environment as part of his treatment?

A. I would say that it's something that I had to keep in mind as to what was going on when I treated Guy, if that makes it a part of his treatment environment.

Q. In your opinion, was Guy emotionally able to join any of the established aftercare programs?

A. Well, he wasn't able to the one time I was attempting to work with him on that, and I hope he's

able to do that following the current episode in the hospital. I think it would be to his benefit.

Q. Would you characterize-- how would you characterize his state when he was unable to join this aftercare program? Would you characterize him as being too well or too ill?

A. His level of fear and anxiety to be with other people simply did not allow him to feel comfortable enough with a group context. He literally retreated back to the isolation in the apartment in order to maintain himself.

Q. Is that the behavior of a healthy person or non-healthy person?

A. For me it seems to be a different level of illness, a lower level of functioning than for someone who is able to manage in the-- or aftercare program.

MRS. LEVINE: I have nothing further.

CROSS-EXAMINATION

BY MR. BOWMAN:

Q. Doctor Janssen, I believe you testified that you started to see Guy Levine in April of 1975?

A. I think that's right, in 1975.

Q. So you took no part in the decision for Guy to stay in Topeka.

A. I was not a part of that original decision at the time of discharge.

Q. Were you even aware that the decision was being made at that time.

A. I don't think so.

Q. Did you even go---

A. Because I was not a part of that treatment team or would have any responsibility for that.

Q. Did you even know who Guy Levine was at the time of his original discharge.

Q. Yes. I was a part of the duty roster that would make rounds on patients on weekends and evenings and knew who Guy was because I would have to attend periodically when I was making rounds. As a matter of fact, I was not his personal physician.

Q. You treated him medically during the period before 1975 on occasion, then.

A. It would really have been up to 1973 when I was still a part of that roster of physicians making hospital rounds.

Q. So you saw him on rounds.

A. I would see him on rounds, yes.

Q. And in '75 you bacame part of Guy Levine's treatment team?

A. I did by virtue of Doctor Norris coming to me and asking whether I could help provide some medicine or some other support because it was not going well at that time.

Q. During 1975 how long a period would you see--well, how many times a week would you see Guy Levine?

A. I would see Guy pretty much on call, because the primary treating professional was Doctor Norris, and I'm very careful not to interfere with that

process, and would see him for anywhere from 10 to 30 minutes at a time so that I could assess how the medicine was working for Guy as he was able to resolve some of the issues; and I wouldn't see him until he himself would initiate some of the contacts.

Q. Would you see him once a week?

A. During the times when I was giving him medication in the early phase, I would see him once a week, sometimes twice a week.

Q. And then later even less that that.

A. Less than that. And then-- you see, the episodic nature of Guy's illness, there would be times when he could indeed have a good deal of independence and work with Doctor Norris without my immediate assistance and at time when he would regress and would require much more of my attention. During the early phases, I think possibily because of Guy's suspiciousness of me also, we did not have to see each other or did not see each other

as much, because he was also trying to test me out I think.

Q. You were primarily responsible for medical treatment.

A. Yes-- well, for psychiatric medication treatment.

Q. What kind of medication were you giving him?

A. We used a wide variety of medication. I can name some of them from memory if you want me to.

MRS. LEVINE: Is it important that you have the names of the drugs?

A. Thorazine, Mellaril, Prolixin, I think I attempted to use Haldol. Cogentin was a medication helped with some of the side effects from the others.

Q. (BY MR. BOWMAN) What was the primary purpose of these drugs?

A. The primary purpose that I was using them for Guy was to provide some relief from the

intense fantasy that he was experiencing.

Q. Were you and Doctor Norris the primary treatment personnel for Guy Levine?

A. Yes, sir.

Q. Did other people treat him?

A. Now you're talking about '74, '75

Q. Well, again let's take them separately. During 1974 and '75?

A. During '75 I was the one besides Doctor Norris who worked with Guy. On occasion when I was out of town, Doctor Reid saw him once. Guy tended to panic when he knew I was out of town; and even though we would provide medicine prescription for him, he often had to check who else could be available. And Doctor Levy also covered for me.

Q. But they were on a fill-in basis.

A. Yes. They weren't his-- the regular person.

Q. Who was primarily responsible for Guy Levine's treatment?

A. Doctor Norris was his psychotherapist, and I was the psychiatrist working with the medication.

Q. Do you know how often Doctor Norris saw him during 1974, '75.

A. I can tell you the treatment plan and that was twice a week.

Q. MRS. LEVINE: Aren't you asking him for his-he doesn't have his medical records here, Mr. Bowman.

MR. BOWMAN: I am asking if he knows.

A. It is my impression that Doctor Norris was seeing him twice weekly for an hour at a time.

Q. (BY MR. BOWMAN) For the time period which you have personal knowledge, that continued---

A. Yes, sir.

Q. --to about two hours per week.

A. Yes. sir.

Q. Did you ever go to Guy Levine's apartment to treat him?

A. No.

Q. When you saw Guy Levine then, it was at the Menninger Foundation.

A. Either in my office at the Menninger Foundation, I saw him on occasion in the emergency room at Stormont-Vail, and I attended him for a short period of time when he was hospitalized, because of disorganization, at Stormont-Vail, in our psychiatric unit. I'm also on staff down there.

Q. Okay. You took no part in picking the initial apartment for Guy.

A. No, sir.

Q. Did you take any part in picking subsequent apartments?

A. No, sir. That typically is something that I would not do as long as there was somebody who would be able to do that for him.

Q. The normal course for a patient then would be have either him or his parents arrange for his living situation.

A. Yes.

Q. As is normal for most individuals.

A. All I can say for our clinical perspective in regard to patients, we want the patient and the parents to be as active in their own behalf as possible.

Q. To your knowledge, was Guy Levine's apartment especially equipped or furnished in any way for medical or psychiatric treatment?

A. Well, never having seen it, I don't know that it was. I am of the impression that he must have acquired some help in keeping it in some order because there were times during--when I would see him that I doubt that he was able to manage those personal details.

Q. You are talking about domestic help in this regard---

A. Yes.

Q. --and not medical treatment.

A. Okay. So to your knowledge no one ever asked or planned for the apartment to be furnished in any particular way for medical or psychiatric treatment.

A. Not to my knowledge.

Q. It was an ordinary apartment.

A. Much like any apartment that our aftercare patients live in.

Q. The Menningers provided no direct supervision at the apartment.

A. No, sir, not to my knowledge.

A. As far as this living situation being a part of his treatment, I believe you testified that it was something you had to keep in mind.

A. Yes.

Q. In other words, you didn't plan this apartment as a direct part of his treatment process; but, as in all other parts of his life, you were aware of what was happening.

A. I attempted to be aware of how his apartment life was because to some extent that reflects his psychological condition. As we are able to manage our personal appearance and so forth, we are able also-- I'm able to assess to some extent the psychological condition which the individual is in. And both Guy's appearance and my checking with him as to how things were going at home gave me some indication of what he was doing and how he was doing.

Q. So you'd say the apartment was more of a reflection of his psychological well-being than a part of the actual psychological treatment

A. I don't think you can separate those two.

Q. I believe you testified that you had no knowledge of the reason that Guy Levine was taught to drive a car.

A. Not being a part of that decision at that time, I don't know that I can comment on what was

behind the idea. I can tell you in a general statement.

Q. Well, I believe you testified generally as to the need for mobility.

A. Right. And also I would hasten to add, the symbolic meaning for a car and transportation for an adolescent.

Q. For any adolescent.

A. Yes.

Q. In fact I believe---

A. But Guy's need to have some hint of independence is an important treatment issue.

Q. I believe you testified mobility is essential. A car represents independence to him as it does to all of us.

A. Fine. But that is not to minimize what it means to Guy.

Q. Independence is important for all of us, and mobility is important for all of us.

A. In a general sense and when I deal with Guy, it's specifically important for him at this stage of development. Just so that's not minimized in relationship to Guy.

Q. Now after he got his license, Guy was permitted to drive alone, wasn't he?

A. That's my impression.

Q. Okay. And to your knowledge he was never accompanied by anyone from Menningers.

A. Not to my knowledge.

Q. And to your knowledge was anyone ever living with Guy at his apartment?

A. Not to my knowledge.

Q. If testimony from another witness were that for a short period of time another former patient was living with him, you wouldn't disagree with that?

A. I have no knowledge of that.

Q. You don't know one way or the other.

A. I don't know one way or the another.

Q. Living with another person was not a part of his treatment process as far as you were concerned.

A. I guess the co-existing with another person in the same room is one factor. I would be very surprised if many of those times Guy was able to live with anybody by virtue of his fear and suspiciousness of them. That was part of---

Q. Your testimony then is that you don't have knowledge of how living with somebody else might have been a part of his treatment plan.

A. I can tell you when I suggested that he be a part of the aftercare program and live in the aftercare house, that was too frightening for him, and he couldn't do that. But as to what his condition was in living with someone else for a short period of time in an apartment, I have no knowledge of that.

Q. Well, let's talk about the aftercare. Menninger's does now have an aftercare program.

A. Yes, sir.

Q. Which Guy Levine could be accepted for.

A. Yes, sir.

Q. It's his---

MRS. LEVINE: May I interject here just for a point of clarification.

MR. BOWMAN: I think you can do it on redirect. This is my cross examination.

Q. (BY MR. BOWMAN) Did Guy Levine ever go to college?

A. Yes. He went to Washburn, and I don't know that he was taking college, or credit. I don't know that detail, but he did attend classes at Washburn for brief episodes.

Q. When he went to college, no one from Menninger's accompanied him to class?

A. Not to my knowledge.

Q. So after he was discharged from the hospital and was living in his apartment, except for the two, three, hours per week that you and Doctor Norris would see him, Guy was on his own.

A. That is my understanding.

Q. Do you have a name for Guy Levine's mental disturbance?

A. The diagnostic category is that of schizophrenia.

Q. There are other facilities in the country that can treat schizophrenia.

A. Yes, sir. This statement is a general one. For Guy specifically, once he was admitted to The Menninger Foundation for treatment, it was imperative that he continue here for the sake of continuity.

Q. You testified I believe that Guy Levine was--well, let me ask you the question. When was Guy Levine admitted to Menningers, if you know?

A. Well, this is only from memory, and I would guess it was in '69.

Q. So your testimony has been that if he left Topeka he would be hospitalized, that would be the repercussion of it.

A. That would be my opinion based upon my knowledge of Guy, the typical history of what a schizophrenic process is.

Q. And whether we call this a step forward or a step backward, Guy Levine is in a hospital in Topeka right now.

A. Well, I want that statement to be taken that I see this as a step forward. He is in the hospital.

Q. Okay. That answers the question.

MRS. LEVINE: Do you mean to say, Doctor---

MR. BOWMAN: Excuse me, I'm not finished.

Q. (BY MR. BOWMAN) You testified that Guy Levine was hospitalized at Stormont-Vail.

A. Yes, sir.

Q. Now Stormont-Vail is only connected with the Menninger Foundation because of your staff privileges as Stormont-Vail. Is that correct? There is no official relationship between the two hospitals?

A. No, sir. It is a community hospital, and I guess the advantages it has for our outpatients is that some of us as staff psychiatrists at the Menninger Foundation also have access to the psychiatric unit at Stormont-Vail.

Q. And when Doctor Kovarik operated on Guy Levine's eye, where was that operation performed?

A. That was at Memorial.

Q. Memorial Hospital?

A. Yes, sir.

Q. And is that attached to the Menninger Clinic?

A. No, sir.

Q. And Doctor Kovarik would have been allowed to operate even if he was not a consultant of Menningers.

A. Yes.

Q. Okay. Generally speaking, you would say that getting somebody out of the hospital is

important treatment, part of the treatment process?

A. Yes.

Q. You wouldn't restrict that evaluation to Mr. Levine.

A. I'm not sure I understand your question.

Q. Well, I believe your testimony was that the community setting, living in an apartment was a part of treatment and getting out of the hospital was a necessary part of his treatment.

A. I see both of those as steps in a treatment program, yes.

Q. And that would be an ordinary step in a treatment program. Your goal is not to keep them in the hospital.

A. That's correct.

Q. Just so the record is completely clear, did anyone ever give counseling other than you, Doctor Norris, or the two doctors who filled in for you once or twice or on occasion.

MR. GLASSMAN: So far as he knows.

Q. (BY MR. BOWMAN) So far as you know.

A. Now you're talking '74, '75?

Q. Yes, '74, '75

A. To the best of my knowledge, there wasn't any other psychiatrists. Since you use the term counseling, I'm trying to-- there wasn't any other psychiatrist, and I don't think that there was any social worker that was a part of the active treatment program. When you say "ever," not to my knowledge, noy typically.

Q. And for the years after '75?

A. Well, when he was at Stormont-Vail, certainly the staff there was a part of the treatment program; and in a general sense, there's counseling that goes on in the group process, although by virtue of his fear he spent so much of his time in the room. I would say the nurses would counsel at that point, but I'm not sure that's what you're asking for in your question.

Q. Okay, fine.

MR. BOWMAN: No further questions.

REDIRECT EXAMINATION

BY MRS. LEVINE:

Q. Since Mr. Bowman has raised the question of who's been having something to do with Guy's counseling after 1975, I'd like to ask you if Doctor Middleman is a staff psychiatrist.

A. Doctor Middleman is the Director of the Emergency Admission Unit. I was not taking into consideration the last number of weeks in that last question.

Q. So there have been in the recent past a number of Menninger Clinic psychiatrists who have been seeing Guy.

A. Oh, yes. The care basically once Guy was admitted to the Adult Service, and that was an attempt of--backing up, that was an attempt of mine.

He needs to be seen and also see himself as more of an adult, and there were many people in the adult system that Guy had access to. I don't know if I can name them all.

Q. So that when you saw the need for--strike that. So that when you were able to persuade Guy to re-enter the hospital or he saw the need himself to re-enter the hospital, there then were placed at his disposal an additional array of Menninger Clinic psychiatrists, were there not?

A. Yes.

Q. And did you say there were three, four even five additional psychiatrists now being involved with him?

A. I don't know the number as to how many are involved with him in the Diagnostic and Treatment Unit.

Q. But you have been contacted by a Doctor Kerns. Right?

A. Doctor Kerns is I think---

Q. And you have being contacted by a Doctor Bogart?

A. Doctor Kerns is the one who contacted me regarding the conference that's coming up.

Q. And the resident is Doctor Bogart in the treatment unit?

A. That's my understanding, but I don't know him personally. Doctor Kerns is the one who called over and made arrangements.

Q. And there was a Doctor Middleman in charge?

MR. BOWMAN: Excuse me. I think we're getting your testimony as to who the psychiatrists are. We would like the Doctor to testify.

A. I'm not entirely sure what the questions are.

Q. (BY MRS. LEVINE) Well, Mr. Bowman asked a question about subsequent to '75 I think it

was, and we are now subsequent to '75, and Guy is involved with a number of additional psychiatrists.

A. Yes. If the question-- and I may have misunderstood the question. I see that my responsibility as Guy's psychiatrist and physician stopping at the moment that he was admitted to the Emergency Admission Unit at the Adult Hospital, and I can't give you the exact date on that, but it was in December. And following that I, although having personal concern and interest in Guy, did not follow his treatment process to this extent, that I feel that he needs to manage those issues on his own within the adult system and I as a child adolescent psychiatrist want to step back.

Q. From your knowledge though of how the adult system operates, there are now psychiatric teams that are employed.

A. Yes, ma'am.

Q. And that would involve more than one psychiatrist at least.

A. That would be the typical process, but I do not know who is exactly on the diagnostic or treatment team right now.

Q. But there are teams working.

A. Yes.

Q. Now who selected Doctor Kovarik to perform the eye operation on Guy.

A. It's my understanding that Guy had been seeing Doctor Kovarik or others in his office for routine eye examinations. At that time, I counted on Doctor Kovarik and his staff to help me because Guy was on very high doses of Mellaril which has one of its side effects to cause pigmentation of the retina, and I needed to know that from Doctor Kovarik early in the process so that we could stop or at least lower the dose, and it was by his observation that he quite suprisingly noticed the retina detachment. Guy had no symptoms at that time.

Q. So Guy's initial visits to Doctor Kovarik were, at your recommendation, to check the eye

because he was taking medication.

A. I asked Guy to go to Doctor Kovarik on that basis because Doctor Kovarik was already his ophthalmologist and I didn't want to change opthalmologists.

Q. And Doctor Kovarik is someone who is associated with the Menninger Clinic.

A. Well, he is by virtue of the fact that we use him and others as consultants. He is not on the staff.

Q. In your opinion, are the number of times a week that any mental patient has psychotherapy any relationship to the character or degree of the mental illness that that patient has?

A. The frequency of therapeutic contacts is determined by the invidivual therapist based upon the clinical needs and the strengths of the patient. Some patients literally cannot manage much more than about one contact a week. The typical use of twice

weekly sessions allows close enough frequency so material can be worked on in a continuous way but allows also some backing off by the patient. Psychoanalysis is a specific--highly specific treatment process, requires four or five times a week, and that often requires a very strong type of personality to manage that.

Q. You're saying then that the stronger the personality the more frequent the sessions can become?

A. They may. They do not have to be.

Q. Depending on the---

A. But I think to attempt to evaluate the strength of the person by virtue of the frequency of therapy doesn't follow.

MRS. LEVINE: I have no further questions.

RECROSS-EXAMINATION

BY MR. BOWMAN:

Q. Just so there is no confusion, in other words, in discussion of the psychiatric teams that become involved and the number of psychiatrists involved after admission to the Emergency Admission Unit, we're speaking in terms of a period of time after December of 1980, are we not?

A. Let me put it-- I'm not sure I understand your question. Guy was admitted to the Emergency Admission Unit in December of 1980, and that is where other professional personnel entered into the picture besides Doctor Norris and myself.

Q. Thank you. That answers the question.

MR. BOWMAN: I have no further questions.

/S/
ERWIN T. JANSSEN, M.D.

STATE OF KANSAS)
) ss:
COUNTY OF SHAWNEE)

Subscribed and sworn to before me this 23 day of January ,1981.

Beth Nelson
Notary Public

My appointment expires:

_____

DEPOSITION OF DR. VERLYN L. NORRIS

AFFIDAVIT

I, VERLYN L. NORRIS, certify that I have read my deposition which was taken on January 20, 1981, in the case of Levine vs. Commissioner of Internal Revenue and request that the following changes be made:

PAGE	LINE	CHANGE FROM	TO	REASON
9	21	..contact for this	..active hospital	clarification
9	22	health and treatment	care and treatment..	"
10	5	..effective,..	..effected,..	transcription error
35	7	..In..	..And..	error
37	2	..time there have..	..time. There have	error

STATE OF KANSAS)
) ss.
COUNTY OF)

Verlyn L. Norris
Verlyn L. NORRIS

I, Betty Nelson, a Notary Public in and for the County of Shawnee and State of Kansas, do hereby certify that on the 23 day of January 1981, the witness, VERLYN L. NORRIS, having been duly sworn on his oath stated that he had read the foregoing deposition in the foregoing case and requests that the above changes be made, signed his deposition before me, and his said deposition is now herewith returned.

Betty Nelson
Notary Public

My Appointment expires March 12, 1981

IN THE UNITED STATES DISTRICT COURT
TAX COURT

IRVING SETH LEVINE and GRACE F. LEVINE, Petitioners,	)	
vs.	)	Docket 9634-77
COMMISSIONER OF INTERNAL REVENUE, Respondent.	)	

DEPOSITION

OF

VERLYN L. NORRIS

taken on behalf of the Petitioners, pursuant to Court Order, beginning at 9:26 a.m., on the 20th day of January, 1981, in the law offices of Sloan, Listrom, Eisenbarth, Sloan & Glassman, 714 Capitol Federal Building, City of Topeka, County of Shawnee, and State of Kansas, before Eleonora M. Lyon, Certified shorthand Reporter, and before H. Kent Hollins, Attorney at Law, officer before whom the deposition is taken.

APPEARANCES

The Petitioners appeared in person and by counsel, Mrs. Grace F. Levine, appearing pro se, Wayside Lane, P.O. Box 84, West Redding, Connecticut, 06896.

The Respondent appeared by and through its counsel, Mr. Michael Bowman, General Counsel, Internal Revenue Service, 2700 Federal Building, 911 Walnut, Kansas City, Missouri, 64106.

Mr. H. Kent Hollins, Attorney at Law, officer before whom the deposition was taken, 3401 Southwest Harrison, Topeka, Kansas 666111

VERLYN L. NORRIS,

called as a witness on behalf of the Petitioners, was sworn by Mr. Hollins, and testified as follows:

DIRECT-EXAMINATION

BY MRS. LEVINE:

Q. Doctor Norris, would you give your full name and address, please.

A. Verlyn L. Norris, Menninger Foundation, Topeka, Kansas.

(THEREUPON, an off the record discussion was had.)

Q. Would you give your position with the Menninger Clinic, please.

A. Yes. I'm a staff psychologist with the children's service at the Menninger Foundation.

Q. And you have a speciality in?

A. Children and adolescents.

Q. And how long have you been associated with the Menninger Clinic?

A. Most recently since 1957.

A. And that's continuously since '57?

A. Yes.

Q. And what has been your training as a clinical psychologist?

A. I was trained originally in the combined Veterans Administration-Kansas University-Menninger Foundation training program in clinical psychology from 1946 until 1950 and subsequently took my Ph.D at Purdue University.

Q. Did you start your training in 1946 with the Menninger Clinic?

A. That's correct.

Q. And what was that training?

A. That was a predoctoral training program in clinical psychology which was initiated following the conclusion of World War II.

Q. And you stayed in that program from 1946 until when?

A. Until 1950.

Q. And then in 1950 you went to the University of Kansas?

A. No. It was concurrent.

Q. Concurrent.

A. That's right.

Q. So that concurrent with your training at Menninger, you then received a Ph.D in 1956?

A. That's correct.

Q. And were you ever certified by the American Board of Professional Psychology?

A. Yes, in 1963 in clinical psychology.

Q. And then were you certified in the State of Kansas?

A. Yes, in 1977.

Q. And what was your first contact with Guy Levine, the taxpayers' son?

A. He was assigned to me as a psychotherapy patient in January of 1970 when he was at that time an inpatient in the Children's Hospital at the Menninger Foundation.

Q. Was he assigned to you in the regular course of your duties at the Menninger Clinic?

A. Yes.

Q. And has he been in treatment with you continuously since then?

A. Yes.

Q. Without break or interruption?

A. Yes.

Q. And as a result of your being his therapist since January 1970, are you completely and thoroughly familiar with his psychiatric problems?

A. Yes.

Q. And his psychiatric needs?

A. Yes.

Q. And his symptoms and illness?

A. Yes.

Q. And with what is necessary for his treatment?

A. Yes.

Q. And could you describe briefly what the form of mental disorder Guy suffers from without becoming too technical.

A. Yes. Guy suffers from a particularly stubborn and long-standing form of mental disturbance in which the problem of maintaining adequate contact with reality is a continuingly tenuous one which has required both inpatient and outpatient treatment and continues to present serious difficulties.

Q. Would you say that the stubborn nature of his illness requires very skillful handling?

A. Yes.

Q. Skillful support?

A. Yes.

Q. Skillful attention?

A. Yes.

Q. Very skilled medical participation?

Q. Yes.

A. Would you say that his illness has, in your experience, a unique quality?

Q. It's quite unusual in several respects, one being its long duration, another being the unusual

tenuous balance between maintaining adequate contact with reality and withdrawing completely into fantasy, an unusual combination which has been sustained over a number of years without ever lapsing completely into a florid psychotic state. But particularly over the past four to five years this has been very difficult to maintain, has necessitated one or two emergency hospitalizations, and he is currently hospitalized again.

Q. Is it your opinion as the treating therapist that it is essential that Guy remain in Topeka, was essential in '74 and '75?

A. in '74 and '75 there were no other places available to us for Guy's treatment which would accept Guy as a patient and which Guy would accept as a treatment facility.

Q. Is it your opinion then that it was and is medically and psychiatrically essential that Guy remain in Topeka?

A. Over the period of time that he has been here, yes. What the future will hold, what kind of plans and programs might develop later, it's hard to predict at this point.

Q. You're talking beyond 1981.

A. Right.

Q. But from the period of his discharge until the present we could say---

A. That's true.

Q. -- it is your firm opinion---

A. Yes.

Q. -- that it was and is medically and psychiatrically essential that Guy remain in Topeka?

A. Yes.

Q. When Guy was released from inpatient status in 1973, what provision was made for him?

A. He was initially discharged from the hospital into a family care home for continued living arrangements there with case work services

combined with a public school enrollment and continued individual psychotherapy with me on an outpatient basis.

Q. What happened?

A. That arrangement could be sustained for only about a month. The combined pressures of living outside the hospital in a family care home and attending public school on a full-time basis proved to be too much for him and both the school placement and the family care placement failed and he had to be temporarily re-hospitalized.

Q. You then came to the point where professionally you had to make another judgement?

A. It was at a point then that the existing hospital program in the children's hospital was no longer effective with Guy and was one that he was struggling strenuously against so that it offered little more for him in the way of contact for this health care and treatment even though he continued to need

residential care. Several other residential centers were contacted but they were unwilling to accept Guy for further treatment and he was largely unwilling to consider other institutions as a source of placement of himself, so the combination of those things left us with relatively few options in attempting to plan continuing treatment for him. And so what was finally effective, as about the only thing that we could find available to us, was for Guy to move into the community, live in an apartment at that point with another former hospital patient, continue his individual treatment with me but to sever all further contacts with the hospital treatment program.

Q. You mean the inpatient.

A. The inpatient facilities. So that was done in effect as the only avenue that we could find that was open to us, at that point, to provide continuing treatment for him so that we had to operate within

those limitations and largely continue to do so since that time.

Q. When you use the word "sever," you do not mean, or do you, that he had no access to the other Menninger facilities?

A. No. That simply means a formal and complete discharge from the hosptial itself.

Q. When you use the word "sever," you mean that he was discharged.

MR. BOWMAN: Excuse me. Why don't you let him explain what it means. If you're planning on using this in court, I will have to object to leading questions.

A. When he was placed in family care, for example.

Q. (BY MRS. LEVINE) May I interrupt a moment, Doctor Norris. What we'd like to have explained now is the meaning of the word "sever."

A. Right. There is a difference in his relationship to the inpatient program between his

being in family care placement and his being discharged from the hosptial and living in the community.

Q. Does this mean, Doctor Norris, that he has no further contact with the hosptial and its support facilities?

A. Hospital facilities of the Foundation as a whole continued to be available to him. Administratively he was no longer an inpatient in the hosptial and was no longer having direct contact with the personnel there.

Q. Then sever is an administrative word, as you use it.

A. That's correct.

Q. But medically and psychiatrically he was being supported by and sustained by the medical and psychiatric facilities that the Menninger Clinic had to offer. Is that correct?

A. That's correct.

MR. BOWMAN: Same objection. It's a leading question.

Q. (BY MRS. LEVINE) I will rephrase. Since counsel objects to the form of that question, would you please explain what the support system was, if any, for sustaining Guy in the community.

A. He continued as an outpatient which means administratively that services were provided through the outpatient clinic rather than through the inpatient hospital facility. As such he continued in direct contact with me in the psychotherapy process. He had available to him the back-up medical services such as the use of Doctor Janssen, as we have done in recent years, to provide medications for him and had access to other services, both inpatient, outpatient, and aftercare services of a variety of kinds provided through the Menninger Foundation should these be needed and should he be willing to make use of them.

Q. How would you evaluate the presence of these services in your treatment of Guy?

A. They have been of vital importance even when they have not been actively used simply because of the knowledge that they are there and the support that this represents. Elements of them have been actively utilized from time to time such as Doctor Janssen's services, such as his--by virtue of his staff position at Stormont-Vail, his arranging for emergency hospitalization there, and exploring the possible use of various aftercare services from time to time which Guy knew were available as resources to him, serving then as further supports at points when he became more distressed and realized that he might need more than was being provided on an outpatient basis.

Q. In you opinion would you consider the presence of these support services and Guy's utilization of them as part of the continuing treatment program that the clinic has to offer?

A. Absolutely, absolutely. Their existence was not only of importance to Guy but of importance

to those of us on the staff who were working with him also; and in the absence of the availability of these support services, we probably would not have been willing to continue to work with him on an outpatient basis. It was just too risky.

Q. At the time Guy was released to live in the community, was there an apartment plan available to the Children's Hospital patients?

A. There is no apartment plan for children patients per se. The Adult Hospital aftercare services had recently opened an apartment living plan as a part of their aftercare services.

Q. Right. Then the Children's Hospital had no such arrangement?

A. The Children's Hospital had no such arrangement. That is correct.

Q. How old was Guy when he was discharged in 1973?

A. Guy was approximately 17 and a half.

Q. He was not eligible for an adult program.

A. And he was specifically not eligible for the apartment living program because that requires a degree of self-sufficiency which Guy did not possess, and he would not have been acceptable into that program.

Q. At that time Guy was discharged, was there an aftercare program for the Children's Hospital?

A. The group home.

Q. That's what I mean, group home, excuse me.

A. Yes, the group home for the— the children's services group home did not open until 1975. It was not available at the time that Guy was leaving the hospital.

Q. Either of these two plans, if they had been suitable as a release possibility, were not available to Children's Hospital patients at the time?

A. That's correct.

Q. Therefore in order to treat Guy, a unique situation had to be created and was created. Is that correct?

A. That's correct.

Q. Now this unique situation was created with the assistance of his parents and with the assistance of Mr. Glassman. Is that correct?

A. That's correct.

Q. Now the Menninger Social Work Department did not take care of this.

A. That's correct.

Q. Now you can explain---

MR. BOWMAN: I am going to have to object again to the leading form of the questions.

MRS. LEVINE: Well, Mr. Bowman, I don't think this one is leading because I've already said and it has been agreed to that Mr. Glassman and Guy's parents have created the unique living environment so---

MR. BOWMAN: Well---

MRS. LEVINE: And he's already answered that without objection.

MR. BOWMAN: If he's already answered a question, his answer can stand without stating your own conclusions.

MRS. LEVINE: All right.

Q. (BY MRS. LEVINE) Now you have testified that this living environment, in order to continue your treatment of Guy, was created by Mr. Glassman and Guy's parents. You've already answered yes to that.

A. Together with the clinic, yes.

Q. Now, the Menninger Clinic has a Social Work Department, does it not?

A. Correct.

Q. And the Children's Hospital has a Social Work Department, does it not?

A. Correct.

Q. Now the Menninger Clinic Social Work Department did not create this unique living environment for Guy, did it?

Q. That's correct.

A. Now can you explain why that was so?

Q. There are two primary factors. One is that the program-- the schedule of the social workers at the Foundation is fairly tight and is tied in with existing programs either the-- as part of the hospital treatment program or in terms of their work with outpatient families or in terms of their work with family care parents, so that there is really not free time available for use in assistance with finding apartments and living arrangements and all of those factors which ordinarily, for our younger patients, are taken care of either by the natural parents or handled through the foster family if they're placed in family care, so that that kind of case work time is really not available. Under highly unusual

circumstances it might be possible to create something special, but it's not a part of the ordinary program of work. The second factor is that the case work aspect of the services were strongly associated with the entire hospital treatment program in Guy's mind and as such were much less acceptable to him because in his mind they represented continuation of the hospital program which he wanted very much to get away from. So given those factors, it did not seem as feasible to attempt to work through the Case Work Department in handling these many arrangements. It seemed as if it might be less successful than— to use the services of a person like Mr. Glassman who could provide the help in managing finances, in managing living arrangements, and many of the day-to-day kinds of living problems that Guy was not competent to handle by himself.

Q. Now these matters such as payment of rent, board, laundry, car or its use, finanacial

counseling and social work supervision are provided by the social workers you were just describing or attached to the institution.

A. Yes.

Q. You also stated that these social workers have a very full program.

A. Yes.

Q. And that this program necessitates their being physically present within the confines of the institution.

A. Yes.

Q. Their appointments are scheduled within the institution.

A. Yes.

Q. They see the patients within the institution.

A. Yes.

Q. They see the families within the institution.

A. Yes.

Q. What you have said then is that they do not have the time to establish this unique kind of community setup that Guy then required.

A. Yes.

Q. That's one of the reasons you gave.

A. That's right. This is not a part of the program that's ordinarily offered.

Q. Would I be correct in saying that if it did, it required the Menninger Clinic to have a roving social worker to go out and take care of a patient with Guy's needs?

A. To provide many of those services, yes.

Q. And therefore the clinic requested that the parents assist in providing this environment for Guy in the community?

A. Yes.

Q. And the clinic requested that the parents assist in providing a substitute social worker in the community.

MR. BOWMAN: Objection. It's a leading question as are many others that I haven't objected to. Go ahead.

Q. (BY MRS. LEVINE) Did the clinic request the—Guy's family to assist in creating this new environment for Guy in the community? You've already answered that yes.

A. Under the circumstances at the time of Guy's discharge it seemed as if about the only feasible arrangement would be one in which he lived in the community here, and other than the individual psychotherapy, the only direct contact—

Q. Excuse me, Doctor Norris, you're not answering the question.

MRS. LEVINE: Would you read back to Doctor Norris, please, my question about two questions back before the objection was made by Mr. Bowman about the assistance— asking the Levine family to assist in getting the apartment and so on. Would you read that back, please.

(No question was read.)

Q. (BY MRS. LEVINE) The question is did you--did the clinic ask the Levine family to assist.

A. Yes, that was---

COURT REPORTER: Wait a minute. Did you want me to read that back?

MRS. LEVINE: Please.

(THEREUPON, the court reporter read back the following questions and answers:

"Q. And therefore the clinic requested that the parents assist in providing this environment for Guy in the community?

"A. Yes.")

MRS. LEVINE: Now, what was that last question again.

(THEREUPON, the court reporter read back the following question and answer:

"Q. Did the clinic request the-- Guy's family to assist in creating this new environment for Guy in the community? You've already answered that yes.

"A. Under the circumstances at the time of Guy's discharge it seemed as if about the only feasible arrangement would be one in which he lived in the community here, and other than the individual psychotherapy, the only direct contact---")

MRS. LEVINE: So I'd like to have everything after you have already answered yes stricken.

MR. BOWMAN: What do you mean stricken? You can't strike anything from the record, can you?

COURT REPORTER: I'm not permitted to unless both counsel agree.

MR. BOWMAN: Well, I object to anything being stricken.

MRS. LEVINE: I'd like the record to indicate that the answer is not responsive and we'll go on to the next question.

MR. HOLLINS: You are registering an ojection relative to his question not being responsive.

MRS. LEVINE: Yes, not responsive. All right, now read---

MR. BOWMAN: May we go off the record for a minute.

MRS. LEVINE: Yes.

(THEREUPON, an off the record discussion was had; WHEREUPON, the court reporter read back the following question:

"Q. (BY MRS. LEVINE) Did the clinic request the--Guy's family to assist in creating this new environment for Guy in the community? You've already answered that yes.")

Q. (BY MRS. LEVINE) And then there was a response that I characterized as not responsive to the question. And now I ask, Doctor Norris, this environment that was created for Guy in the community, in your opinion is that a therapeutic environment?

A. Yes. It's part of his total treatment program. It's by no means ideal, but it was the best that we could arrange under the circumstances.

Q. Was there a time when Guy was inpatient in the Children's Hospital that he was given driving instruction?

A. Yes.

Q. This driving instruction was initiated by whom? You don't have to state specifically the person.

A. He was enrolled in a driver's education course at the request of the hospital as a part of plans to prepare him to move out of the hospital and into the community.

Q. Guy was given driving instruction at the initiation and under the supervision of the Menninger Clinic?

A. That's correct.

MR. BOWMAN: I don't believe he testified that it was under the supervision of the Menninger Clinic.

Q. (BY MRS. LEVINE) Was Guy inpatient at the time?

A. Yes.

Q. As an inpatient are his activities supervised?

A. Yes.

Q. And if he was given driving instruction, discharge hospital that also be supervised?

A. Well, I'm not sure what supervision would mean then.

Q. Would the driving instructor be someone selected by the clinic or the driving school?

A. Yes, yes.

Q. And all arrangements for this instruction would be made by the clinic.

A. Yes.

Q. And who would pay for it? The clinic?

MR. BOWMAN: Leading question.

A. Yes. It would become a part of the charges associated with his treatment program at that point.

Q. (BY MRS. LEVINE) It would be paid for by the clinic and then billed to the parents.

A. That's correct.

Q. As a part of the treatment charges.

A. That's right.

Q. What was the purpose of giving Guy this driving instruction?

A. Well, while he was in the hospital, hospital transportation was available to him. At the point of discharge, hospital transportation would no longer be available to him and he would have to be prepared to provide his own. Consequently, driver's training was made available in order that when he left the hospital he would be able to provide his own transportation.

Q. Was there any anticipation of an emergency need on Guy's part?

A. I'm not sure I understand the question.

Q. Was Guy given this instruction so that he would have mobility?

A. Yes.

Q. Mobility to go back and forth between his apartment and the clinic?

A. That's true.

Q. And did it also encompass the possibility that should an emergency arise Guy would then be able to quickly get to the clinic?

A. That was certainly included as a part of what's offered. It was not the primary consideration. The primary consideration was to prepare him to be able to function more autonomously in the community, including being able to get to and from public school which was a part of his program at the time of discharge.

Q. After he proved incapable of sustaining the aftercare program that was originally set up and that lasted only a month, as you testified.

A. Right.

Q. Then the need for the car became different, did it not?

A. He was no longer in school so he did not have that requirement. The need for the car continued to be to get to and from his appointments with me, and hopefully that he would be able either to begin school again at a later point or obtain some kind of work with which to occupy his day.

Q. That did not transpire?

A. Unfortunately neither of those came about in any sustained way.

Q. In your opinion Guy was too ill to sustain either of those hopes.

A. That's correct.

Q. Was Guy ever able to perform at any kind of gainful employment?

A. He managed one job for a period of about two weeks. On a couple of different occasions he managed a kind of unusual arrangement where he worked pretty much at his own hours.

Q. Was that in '74, '75?

A. Within the '74-75 period he had one intermittent job for a brief period of time which was not sustained.

Q. Couldn't sustain it?

A. No.

Q. Would you then say that the car became a vehicle for him to be able to meet his medical and psychiatric needs at the Menninger Clinic.

MR. BOWMAN: Leading question, objection.

Q. (BY MRS. LEVINE) Now is it your professional opinion that Guy should and must live in Topeka?

A. Yes, particularly over this past ten-year period.

Q. And would you say that he just lives here so he can see you twice a week or does his living here represent something more?

A. His living here has represented the only way that it's been possible to sustain him in a

treatment program and in a setting which has available the variety of backup resources that are necessary; and, therefore, we have felt that it was essential that he remain here because we've not been able to find any other place that he could be that would accept him or that he would accept. It's been essential from that standpoint in terms of being the only option that we have been able to find.

Q. Then your discharging him from the inpatient hospital does not mean that you have discharged your responsibility for treating Guy?

A. Oh, absolutely not.

Q. It means that you've substituted one modality for another.

A. We've simply shifted the treatment program.

Q. Could it have been possible in 1974 and 1975 for Guy to have left Topeka without harmful effect?

A. The problem at that point was that it was difficult to find anyplace else that would accept him.

Q. I'm asking without harmful effect should he have left Topeka. You've already testified twice to that. Now could he have left Topeka without harmful effect?

A. Under those circumstances, no.

Q. Those were the circumstances--that was the reality situation.

A. That's correct.

Q. You've testified twice now that there was no other place that would have accepted him even if there had been no objection on Guy's part for further hospitalization.

MR. BOWMAN: That's not what he's testified. You're mischaracterizing his testimony.

Q. (BY MRS. LEVINE) Doctor Norris, have you testified that there was no other hospital that would accept him?

A. At the time that he was discharged from our hospital, we were unable to find any other hospital that we considered a reputable treatment institution that would accept Guy.

Q. Therefore, this alternative therapeutic setting was set up?

A. Right.

Q. This was, in '74 and '75, a therapeutic setting?

A. That's true. The best we could construct under the circumstances.

Q. All right. Now I'm going to ask you a hypothetical question, Doctor Norris. As an expert in mental health and as a member of the Menninger Clinic since 1957 and as you have been previously qualified in the record.

MR. BOWMAN: For the record I would make the objection that he is not qualified as an expert witness. Go ahead.

A. (BY MRS. LEVINE) All right. Counsel for the IRS is stating for the record that you're not an expert Doctor Norris; but with that objection in the record, I'd like to ask you a hypothetical question. Suppose that Mr. Jones who lives in Connecticut goes to Houston to visit Doctor DeBakey for an unique life-sustaining heart operation of some kind and while there he has to stay at a hotel for three or four weeks. Mr. Jones' of Connecticut medical fee to Doctor DeBakey and to the Houston hosptial and to the medical personnel would be a deductible expense, but Mr. Jones' residence in the hotel would not. Now how would you distinguish Guy's case here in Topeka from that of a taxpayer who travels a long distance from Connecticut to Houston to get a medical procedure which we can concede here may be unique?

MR. BOWMAN: Are you through?

MRS LEVINE: Yes.

MR. BOWMAN: Well, in that case I certainly would renew my objection. He may be an expert in

psychology or psychiatry. I don't think he is qualified to give an opinion as to legal distinctions for the purposes of medical deductions.

MRS. LEVINE: Well, as I get counsel's objection now, he is now conceding that Doctor Norris is an expert.

MR. BOWMAN: No, I did not concede that.

MRS. LEVINE: Well, didn't you just say conceding he may be an expert, he is not a lawyer.

MR. BOWMAN: I said if he were an expert on psychology that would not make him an expert on legal distinctions for the purposes of medical deductions.

MRS. LEVINE: I'm not asking Doctor Norris to make a legal judgment here. I think we're going to have to leave that for the court.

MR. BOWMAN: I think that's right.

MRS. LEVINE: But I am asking Doctor Norris to make a judgement within his field of expertise,

which is mental health, and to distinguish a mental health situation from a purely medical situation and to bring out for the record and for the court what the ramifications are of a mental health situation which encompasses as part of the mental health environment the living arrangements that the patient lives in which even a layman would know does not comprise the purely medical situation.

MR. BOWMAN: We don't need to argue this. I made that objection for the record.

MRS. LEVINE: Right.

Q. (BY MRS. LEVINE) Can you answer the question now, Doctor Norris, as to what in your judgement would be the difference between a purely medical situation and a situation that involves the variables and the intangibles and the probabilities of a mental health situation?

A. One obvious difference is the brevity on the one hand of the usual medical procedure as

compared with the long-term arrangements with problems of this order. I would think that one important distinction would be the fact that in the hypothetical example Mr. Jones with the heart problem is quite competent to manage his own affairs in terms of living arrangements and finances and so forth. Guy is not. He has not been capable of handling these things himself. A kind of setting has to be created in which those functions are either carried out for him or supervised.

I suppose the second distinction would be that whereas the living arrangements in terms of a straight medical problem would be ordinary living arrangements. In a situation like Guy's, the living arrangments become a part of the treatment program in the sense that in some ways it represents a substitute hospital. A very much stripped-down version of one which does not offer the kinds of services that are available or even needed in this

case, but represents a protected living setting where many of the responsibilities are taken care of or supervised by someone else. In order to make it possible for him to live in the community and continue a treatment program under those circumstances. Those would be distinctions that would immediately come to my mind.

Q. All right. Now, do you know where Guy is now?

A. Yes, he is currently hospitalized.

Q. In your opinion does this hospitalization represent a step forward or regression?

A. It represents a step forward along two very important dimensions. It is something which Doctor Janssen and I have been encouraging since last spring as a part of the ongoing treatment program and in an effort to get a new assessment of the total situation. Guy has been frightened, too frightened, to take this step in the past; and it's taken more than six months to get there.

Q. Right. Now in your opinion, Doctor Norris, would you say today in 1981 that Guy's ability to take this step forward represents a validation of the treatment process as it has been carried forwa d by you and the clinic and Mr. Glassman since 1973?

MR. BOWMAN: Well, I'd object on the grounds it's a leading question again.

Q. (BY MRS. LEVINE) How do you see this step forward of Guy's with respect to what has gone before?

A. I see it hopefully---

Q. With respect to what has gone before, Doctor Norris, not what may come.

A. The fact that he has been able to take the step is a positive and encouraging sign which is one kind of evidence that he has been able to make use of and profit from the ongoing treatment program in the intervening years. The second element that provides important evidence in that direction is the fact that

he has been able to sustain himself over these past years without becoming so disorganized that hospitalization has been absolutely mandatory. And, given this state, the fact that he has been able to hold together to that point I think represents an important verification of the usefulness of this supportive program for him.

Q. All right. Then can we end your testimony this morning by saying simply that the treatment program initiated in 1973 accomplished two things to which you've just testified, that it enabled Guy to move forward, to make some progress, and while he was making that progress it enabled him to be held together without becoming flagrantly psychotic or disintegrating to the point where he needed immediate hospitalization. Is that a correct summary?

MR. BOWMAN: I would object to the question.

Q. (BY MRS. LEVINE) Is that a correct

summary of what you just testified to, Doctor Norris?

A. That's correct.

Q. Have you just testified to that?

A. That's correct.

Q. And am I summarizing it correctly?

A. That's correct.

MRS. LEVINE: All right. No further questions.

MR. BOWMAN: Would you like to continue at this time or would you like a short break?

(THEREUPON, a short recess was had)

CROSS EXAMINATION

BY MR. BOWMAN:

Q. Doctor Norris, during 1974, and '75, how many sessions per week did you have with Guy Levine, counseling sessions?

A. Typically two sessions per week.

Q. And the length of each session would be how long?

A. 50-minute hour

Q. Two sessions you say?

A. Uh-huh.

Q. So you're seeing him less than two hours a week.

A. Yes.

Q. And has that timing continued up to the present?

A. For much of the time. There have been periods when we have met three times a week for an extended period of time and there have, from time to time, been special appointments but much of the time it's been on a twice weekly basis.

Q. So when it's been more, it would be three hours per week.

A. Right.

Q. Except on special type situations?

A. Right.

Q. How often would those arise?

A. Not frequently. Once every few months.

Q. And where did you give therapy to Guy Levine?

A. In my office at the Foundation.

Q. Did anybody else participate in therapy with Mr. Levine?

A. No. These were individual appointments.

Q. Excuse me. I meant to ask whether any other treating persons participated in therapy.

A. Not in the psychotherapy sessions. Doctor Janssen has been actively involved for several years in handling and supervising the medication that Guy has been on and in helping him with some of the reality issues that he has confronted.

Q. So he would meet with Guy Levine on occasion.

A. Yes.

Q. How long would that be? Would that be every week?

A. It varied. He will be able to tell you a little later.

Q. But he was not involved in the psychotherapy per se?

A. That's correct.

Q. Did you ever hold a session in Guy's apartment?

A. I have seen him in his apartment on at least one occasion, yes.

A. What was the purpose on that one occasion? Pyschotherapy?

A. Yes. It was in kind of a crisis state in an attempt to help him maintain his hold on reality right at that moment.

Q. But you don't consider therapy in the apartment to be a part of the therapy?

A. No. Not ordinarily, no.

Q. Now I believe you testified that at the time Guy Levine moved into the apartment there was

one other person living there, a former patient or a former resident.

A. That was the first arrangement, yes.

Q. How long did that last?

A. A short time, not more than a month or so.

Q. And after that did anybody else ever live with Guy Levine?

A. No.

Q. And the purpose of the other person living in the apartment for the short time that the occurred was not therapeutic. That resident wasn't to give therapy to Mr. Levine?

A. No, no. The social contact, it was hoped, would have therapeutic benefit but the other person wasn't a treater, no.

Q. As far as social contact having therapeutic value, it could have been social contact with anybody, couldn't it have?

A. Anyone I suppose where the two of them had been able to have some kind of a compatible relationship.

Q. I see. Guy did not receive direct supervision in the apartment. Is that correct?

A. Not by me.

Q. Or as far as you know by other treating psychologist or psychiatrist or doctors.

A. Present in the apartment with him, no.

Q. And would you describe the-- how would you describe the apartment in generalities?

A. It's fairly small and relatively sparse but livable.

Q. It wasn't especially equipped or furnished in any way to promote psychotherapy or treatment or medical treatment.

A. No. There were no special provisions in it.

Q. It was an ordinary apartment.

A. Yes.

Q. And the apartment house where Guy lived, it didn't provide medical care or supervision in any way.

A. No.

Q. You testified that Guy Levine was permitted to drive a car.

A. Right.

Q. And when he was driving the car no one from Menningers accompanied him, did they?

A. Right.

Q. Okay. I'd like to go back to a question that was asked of you on direct. The question I believe was Guy's driving instructor selected by the driving school or clinic. I think the answer was yes. Who selected the driving instructor for Guy?

A. The hospital. The Children's Hospital made the arrangements.

Q. You picked a specific instructor?

A. They did, I didn't, pick a particular program for him to be enrolled in for driver's education, yes.

Q. Was that driving training school, driver's ed school?

A. It was a driver's ed program. I don't recall at this point whether it was in the form of individual instruction or whether it was through the public school, but it was a certified course in driving instruction.

Q. You weren't really involved in selecting the driving school?

A. I myself, no.

Q. Or the driving instruction.

A. No.

Q. Or how that would be carried out.

A. No. That was done while he was in the hospital and was done by hospital— hospital physician and social worker.

Q. Okay. And I believe you testified that getting to the hospital for emergencies was not the primary purpose of the car.

A. Not the primary purpose, no.

Q. The primary purpose was to give him mobility so he could get around Topeka.

A. Yes, so he could get to places he had to be when hospital transportation was no longer available to him.

Q. And in that regard he owned the car for much the same reason that you own a car and that I own a car, so that we can get around where we live.

A. Yes.

Q. Did Guy attend college?

A. He has been enrolled on occasion, has successfully completed maybe one or two courses, had to drop a number of courses and finally was unable to continue with a college enrollment at all.

Q. When Guy did attend classes he went on his own. He wasn't accompanied by anyone from

Menningers?

A. Correct.

Q. That true?

A. Correct.

Q. So we've established that for the most part of the time in question, you were seeing Guy Levine about two hours a week or actually less than two hours a week and that Doctor Janssen was seeing him also infrequently and for short periods of time.

A. Yes, I don't recall without refreshing--without checking back on it how active Doctor Janssen was with Guy during that specific period. In subsequent years he has been much more active, but I simply don't recall during that two-year period. He can tell you.

Q. Doctor Janssen might have seen Guy at times when you didn't?

A. Oh yes, oh yes.

Q. Okay. Now the apartment house, you testified that these type of arrangements would

usually be made by the social work. Did I understand your testimony correctly, the Social Work Department?

MRS. LEVINE: Excuse me.

Q. Social services.

MRS. LEVINE: I think the testimony will indicate, if read back, that the Children's Hospital in 1973, '74, and '75 did not have an apartment arrangement so that there is nothing that could have been arranged by the social workers or anybody else. And additionally the testimony will indicate that there were no social workers available for that unique type pursuit.

Q (BY MR. BOWMAN) Okay. Now, the social workers then did not— I just want the record to be clear on this. As far as Guy Levine's situation, they were not involved in that situation.

A. Subsequent to his leaving the hospital, correct.

Q. They didn't find his apartment or provide him food or clothing?

A. Correct.

Q. Or anything like that?

A. (Nods up and down)

Q. So except for the few hours per week that Guy Levine was in therapy with you or was seeing Doctor Janssen, he was basically on his own in the community.

A. Yes.

Q. Would you agree that Menningers is not the only hospital in the United States that could have treated Guy Levine?

A. That's probably so, yes.

MRS. LEVINE: You're saying it is the only hospital.

DOCTOR NORRIS: No.

MR. BOWMAN: Excuse me. This is my examination. You will have your chance on redirect.

Q. (BY MR. BOWMAN) Okay. There are other hospitals that have psychotherapy.

A. True.

Q. And have backup staff?

A. True.

Q. And as far as some of the backup staff at Menningers, there was no need for Guy to have, for instance, neurosurgeons.

A. No. They've not been utilized.

Q. So there are other places in the United States where Guy Levine could have been treated.

A. Now you refer to hospitals. Are you referring to the inpatient phase to his treatment program? Could he have been, instead of hospitalized in the Menninger Foundation, hospitalized in some other hospital in the United States and received medical treatment?

Q. Let's consider both. There are other hospitals in the United States where Guy could have been hospitalized for inpatient care.

A. True.

Q. And after the inpatient care was completed, there are other hospitals which have outpatient services.

A. Yes, that exist.

Q. Now I believe you testified three times on direct, and would have testified four times had you not been interrupted, that you couldn't find another place that would accept Guy and that Guy would accept.

A. At the time that he was discharged from our hospital, that's true. We could not find another hospital that we considered a good treatment hospital who was willing to accept Guy as an inpatient. Nor was Guy willing to accept other hospitals.

Q. So one factor keeping Guy in Topeka was his own decision that Topeka was the place for him?

A. Well, I wouldn't put it that way. One factor keeping him in Topeka was that it was possible

to sustain some kind of treatment program here, and we did not find a treatment program anyplace else that would take Guy or that he was willing to participate in. Both parts have to be present. They have to be willing to take him and he has to be willing to go if anything is going to be accomplished. We were not able to find any such things and so this was the only option left to us that we could locate.

Q. So his willingness to go someplace else was a factor?

A. Oh, sure, absolutely. And has to be.

Q. If you'll excuse me for a moment.

A. He was approaching 18 years of age. No way you can keep him in the hospital against his will after he reaches 18.

Q. So then the decision to stay in Topeka was a voluntary decision on his part---

A. Yes.

Q. -- which you had no control over. Okay. You have testified that it would be risky for him to

go somewhere else. Could you detail what those risks might be?

A. Over the previous years he had such difficulty in being able to establish any kind of trust and confidence in other people that the likelihood of his being able to enter into a treatment program, a therapy process someplace else, was extremely limited. Possible but highly unlikely or fraught with much difficulty. Were he to have left Topeka during that period of time, so far as we could see, that would have meant his being essentially without outside treatment resources to help him; and under those circumstances, the great likelihood is a further decline, a further withdrawal from people, and a retreat into a psychotic state. That was our concern.

Q. Who picked out Guy's apartment?

A. Well, he's had several. Which one?

Q. Well, the original one. Who makes the decision where he lives and has it changed over time?

A. Okay. The original one was selected by Guy and his parents at the time of his second and complete discharge from the hospital. Subsequent apartments have been selected by Guy with the help of Mr. Glassman.

Q. You don't get involved in the process of picking an apartment.

A. That's right.

Q. You've testified Guy in now hospitalized.

A. That's correct.

Q. Where is he hospitalized?

A. In the Adult Hospital at the Menninger Foundation.

MR. BOWMAN: I have no further questions.

REDIRECT EXAMINATION

BY MRS. LEVINE:

Q. I have one or two redirect, Doctor Norris. Counsel for the Internal Revenue Service has asked questions about the number of times Guy has been in therapy with you per week. Has the number of therapeutic sessions per week per patient any direct relationship to how ill that patient may be?

A. Yes, may very well have a relationship to it but it may differ in each individual case. There's no general rule that applies to all people, no.

Q. Now is it possible in your opinion for a patient to be so ill as not to be able to sustain any therapy at all?

A. Oh, yes.

Q. And is it possible in your opinion that if a patient has therapy say four or five times a week that would indicate that that patient is strong enough to sustain therapeutic session of that number?

A. Well, that depends. In some cases, yes. some of the most intensive forms of treatment require— involve frequent contacts and require great inherent strength on the part of the person being treated. Occasionally quite seriously disturbed patients will be seen on a very frequent basis also, for different reasons and in a different way; but sheer frequency on the part of the patient so the choice of the number of times to see the patient would in each individual case be influenced by some assessment of the patient's strength and the purposes in seeing them more or less frequently.

Q. Now getting specifically to Guy's case, the fact that Guy saw you twice a week, is that any indication of how well or how ill he was?

A. No, no. That frequency was chosen because it seemed to be a useful and effective frequency that we deviated from time to time as circumstances changed and as needs changed, but

that he was seen twice a week does not mean that he was either half as strong as somebody seen four times a week or half as sick as somebody seen four times a week.

Q. In your opinion Guy was quite ill?

A. Yes, was and is.

Q. Now the occupant of Guy's in the initial apartment who stayed such a short period of time, you testified only a month or so, he was a former patient with Guy in the Children's Hospital, was he not?

A. Right.

Q. And as such a former patient would be a compatible companion.

A. Right.

Q In your opinion Guy could not then live--or possibly until the recent past, live with someone who was not finely tuned to the needs of mental people--mental patients?

A. He did not even live successfully with that patient that he had known. No, he is by and large quite withdrawn, able to have little more than very superficial social contacts with other people which is one of the goals and hopes of the present period of hospitalization, that some greater bridges to other people can be established.

Q. Last question. Is it a practice of the Menninger Clinic doctors to supervise their patients in any way?

A. I don't know that I know what that means.

Q. Except therapeutically. I mean, in other words, do the doctors on the staff of the Menninger Clinic supervise the day-to-day activities or any of the problems of daily living of their patients?

A. Ordinarily not, no. If those functions were necessary, they ordinarily would be carried out by one of the other people involved.

Q. So that it is not part of your responsibility with any patient you treat in the Menninger Clinic to

take care of any of the day-to-day activities that may arise.

A. That's true.

Q. There is a social work staff for that.

A. True.

MRS. LEVINE: I have no further questions.

RECROSS-EXAMINATION

BY MR. BOWMAN:

Q. There is a social work staff to provide supervision for people's day-to-day living. Is that what your testimony was?

A. There is a social work staff. Ordinarily they are not primarily involved in providing day-to-day supervision of people's living, no.

MR. BOWMAN: Thank-you. I have no other questions.

MRS. LEVINE: May we excuse Doctor Norris then.

(THEREUPON, the desposition was concluded at 11:09 a.m)

/S/
Verlyn L. Norris

STATE OF KANSAS)
) ss:
COUNTY OF SHAWNEE)

Subscribed and sworn to before me this 23 day of January, 1981.

Betty Nelson
Notary Public

My appointment expires:

_____

DEPOSITION OF ARTHUR A. GLASSMAN

UNITED STATES TAX COURT

IRVING SETH LEVINE and GRACE F. LEVINE, Petitioners,	)	Docket 9634-77
vs.	)	
COMMISSIONER OF INTERNAL REVENUE, Respondent.	)	

DEPOSITION

OF

ARTHUR A. GLASSMAN,

taken on behalf of the Plaintiff, pursuant to Court Order beginning at 12:23 a.m., on the 20th day of January, 1981, in the law offices of Sloan, Listrom, Eisenbarth, Sloan & Glassman, 714 Capitol Federal Building, City of Topeka, County of Shawnee, and State of Kansas, before Eleonora M. Lyon, Certified Shorthand Reporter, and before M. Kent Hollins,

Attorney at Law, officer before whom the deposition is taken.

APPEARANCES

The Petitioners appeared in person and by counsel, Mrs. Grace F. Levine, appearing pro se, Wayside Lane, P.O. Box 84, West Redding, Connecticut, 06896.

The Respondent appeared by and through its counsel, Mr. Michael Bowman, General Counsel, Internal Revenue Service, 2700 Federal Building, 911 Walnut, Kansas City, Missouri, 64106.

Officer before whom the deposition was taken, mr. H. Kent Hollins, Attorney at Law, 3501 Southwest Harrison, Topeka, Kansas.

ARTHUR A. GLASSMAN,

called as a witness on behalf of the Petitioners, was sworn by Mr. Hollins, and testified as follows:

DIRECT-EXAMINATION

BY MRS. LEVINE:

Q. Would you give your name and address for the record, please.

A. My name is Arthur A. Glassman. My address do you say?

Q. Yes, please.

A. My business address is 714 Capitol Federal Building, Topeka, Kansas.

Q. Are you an attorney?

A. I am.

Q. Are you licensed to practice law in the State of Kansas?

A. I am.

Q. And are you licensed to practice law in the State of Kansas?

A. I am.

Q. And have you also some background as an attorney and as an individual with respect to matters of mental health?

A. Yes.

Q. Could you give just a brief statement of those?

A. Well, I'm not trained as a mental health practitioner in any sense. I'm trained as a lawyer. I have handled a number of cases involving mental illness as an attorney. I've also handled a number of cases involving people who are allegedly incapacitated, tried perhaps two dozen in cases involving commitments for mentally ill persons, and I've worked with various physicians from time to time at the Menninger, Memorial Hospital, at the Topeka State Hospital, Topeka, Kansas; at the Parsons State Hospital; at other State hospitals; and at the Veterans Administration Hospital here in Topeka, Kansas.

Q. All in the departments of mental health?

A. Well, having to do with mental illnesses or incapacities of one nature or another involving people who are clients.

Q. So as a layperson, then, you have had an opportunity to see a great many people who are problem ridden.

A. I'd say that's a fair statement. I would only add that I don't consider myself a layman since I'm a lawyer; but in the field of mental health practioner-- as a mental health practioner, I am a layperson, yes.

Q. Now did there come a time when you were contactd by Mr. and Mrs. Levine, the parents of Guy Levine?

A. Yes.

Q. Do you know when that was?

A. It would have been in the early '70's and prior to the 1974, '75 matters that are involved in this series of depositions.

Q. Would March '73 sound accurate?

A. That would be accurate to the point that I know that it was at least in 1973 that I had some meetings with you and Mr. Levine.

Q. And did they make a request of you at that time when they contacted you?

A. I'm sure they did.

Q. What did they ask you to do.

A. Basically they wanted to know whether I would participate in taking some responsibility for assisting Guy Levine with his financial affairs, various matters that might ultimately result in some problems with the law, various problems that they identified to me as having to do with just management of his person, matters that had to do with my contacting the Menninger Foundation personnel that were primarily responsible for his treatment in the event that he developed some problems that were evident to me.

Q. Did you undertake this responsibility?

A. I did.

Q. And as a result of undertaking this responsibility, did you see Guy Levine on a regular basis?

A. Yes.

Q. How often would you say you saw Guy Levine?

A. Well, it would vary. No less often than once a week for varying periods of time during so-called crisis of one sort or another that from time to time would develop. It was on a more frequent basis for, again, varying periods of time.

Q. And did you undertake for payment the task of managing Guy's finances?

A. Yes, to a point. I was entrusted with funds from Mr. and Mrs. Levine from which I regulated how Guy utilized those funds; and I undertook, together with his parents, supervision how he actually used those funds. I doled them out to him periodically, paid certain bills of his, had a checking account with my name on it which in essence was set up for a trust account for him; and I still do that, yes.

Q. Did you manage any community relationships for him?

A. Well, I guess you could call it that. I worked with his apartment manager through a number of problems that developed, handled various matters pertaining to his insurance, handled various problems that he encountered with the telephone company, handled various problmes that he had associated with work, one time procured some employment for him, assisted him when he had some difficulty in regulating how he bought certain items like clothes, medical prescriptions, repairs for his car, certain problems he led into having to do with encounters with the Welfare Department where he was trying to get additional assistance of some nature, that sort of thing. All of that spanning a period of time between 1973 and the present.

Q. Did you pay his rent bill.

A. Yes.

Q. His telephone bill?

A. Yes.

Q. Kansas Power and Light?

A. Yes.

Q. Is that because the Kansas Power and Light bill is separate from the apartment rent?

A. Yes, to my best recollect-- yes, that's true.

Q. You paid for a cleaning lady?

A. Yes.

Q. Why was that?

A. Why?

Q. Yes.

A. Because, and it did span this 1973 through 1975 period, on at least two occasions he was to have been kicked out of his apartment because it wasn't properly cleaned. He'd experienced a number of other problems with visitors, being fellow patients for the most part, coming to the apartment at all hours of the night; and it became necessary to do that, to manage his relationship in some fashion with

the apartment owner in order to give him a place to live and to in essence pacify them sufficiently so they would let him stay there.

Q. And how many hours a week did this cleaning person stay there?

A. It varies I'm sure, varied and still does. It varied based on how much time Guy was there since part of the time he was in the hospital. Also part of the time, because of his illness, he would have more guests than others. I personally know this, when there were a large number of people that frequented the apartment, it got in worse shape, therefore, the time necessary was greater.

Q. Yes. But when you have-- looking at the charges that you expended, it very rarely, if ever, was more than two hours a week.

A. I doubt if it was any more than that. I think that's a fair statement. The charges made were so nominal that I couldn't believe anybody would put up or couldn't spend any more time than that.

Q. Would you say that on an average it was probably more than one hour a week that the cleaning person was there?

A. That would be a fair statement.

MR. BOWMAN: Why don't you ask him what the average was instead of testifying for him. I will make a formal objection.

A. My best judgment is that the amount of time was usually about an hour or two hours a week at the most for which a nominal charge was made, what I considered a nominal charge.

Q. (BY MRS. LEVINE) Now was there a compulsary insurance law in Kansas?

A. Yes.

Q. Did Guy's vehicle come within the purview of that law?

A. Every vehicle does so, yes.

Q. Guy's automobile had to be insured.

A. Yes.

MR. BOWMAN: For the record, it's a minor point but it's a testimony as to law. The law is a matter for the court to decide.

MRS. LEVINE: Well, I'm asking the Tax Court to take judicial notice of the fact that the State of Kansas has a compulsory insurance law.

Q. (BY MRS. LEVINE) Did you receive a fee from Mr. and Mrs. Levine for these services?

A. Yes.

Q. How would you characterize that fee; in other words, what does it represent?

A. Well, the fee represents the service I provided for them but primarily for Guy in performing the duties that I already enumerated.

Q. You're talking about your non-legal duties?

A. And legal duties, yes. Primarily non-legal duties I would say.

Q. Are you saying that the fee represents primarily non-legal duties?

A. I think it would, yes.

Q. How did you view the role of the Menninger Clinic with respect to Guy?

A. Well, I was aware that Guy Levine was severely ill, speaking of the period from 1973 through 1975 -and really that still persists - but directing my comments to that period, I was aware that he was treated by Doctor Norris, I was aware that Doctor Janssen participated, I was aware that he was severely drugged much of the time even to the point where he couldn't carry on a normal conversation in talking with me in our approximate weekly meetings during that period of time. I knew they were treating him and that it was imperative that he maintain some stability outside of the hospital and that that was Doctor Norris's and Menningers's focus and that I was to compliment that to whatever extent I could. Basically that's the role I saw myself playing is complimenting Menninger's treatment and trying to

maintain some stability for Guy in the environment that wasn't very readily accepting him; i.e., the personal relationships he had with various people, his so-called friends; people that he bought food from; people that he tried to get insurance from; day-to-day tasks that you and I take for granted that he could not accomplish without assistance in my opinion. So I was aware that Menningers was providing technical treatment of his problems, that they wanted the family, myself to assist him and---

MR. BOWMAN: Hold on. I'm going to interject an objection at this point. I've permitted this to go on as to what he knew; but at this point when he testifies as to what he knew Menninger wanted, that's more than a tangential matter and I am going to have to require some foundation as to how he knew it. If it was just what somebody told him, it's hearsay and I object.

Q. (BY MRS. LEVINE) Mr. Glassman, you viewed your role as being complimentary,

supplementary to whatever the Menninger Clinic was supplying.

A. That's a fair statement.

Q. When you saw Guy on a regular basis, you had an opportunity to observe him?

A. Yes.

Q. And based on your observations, how did he appear to you?

A. Well, during what specified time, If I may.

Q. '74, 75.

A. Consistently Guy always, to my knowledge, with one brief exception has appeared to me to be disheveled, disorganized, unduly overweight exemplified by the fact that sometimes he would be extremely obese and within a period of six months would lose weight significantly, unshaven rather consistently, inability to cope with shaving and keeping his person clean, smelly. I observed a marked inability, during 1973 through 1975 on many

occasions when he was heavily on drugs that I personally was aware of - I mean I was aware he was on drugs for his illness - when he had difficulty in talking, speech slurred. That's how he appeared to me.

Q. In your opinion, Mr. Glassman, could Guy have managed his own affairs in any way during this period?

MR. BOWMAN: Okay, I'll object there. You're requesting an opinion of a lay-witness. It's not permitted by the Federal Rules of Evidence. I use the lay-term psychologically in deference to the witness.

MR. GLASSMAN: Since we share the same profession, I appreciate that.

MRS. LEVINE: But where a layperson is competent to make a judgement and he is entitled to give an opinion—

MR. BOWMAN: That's not true, but I've made my objection so he can answer the question.

MRS. LEVINE: I'm going to state the basis which I think your objection is incorrect. For instance, if a layperson is testifying that a car was going 60 or 70 miles an hour, that is a competent opinion from the point of a layperson even though that layperson is not an engineer. Now it is my contention that Mr. Glassman's observations which preceded my question as to whether he was competent to manage his own affairs lay sufficient foundation for Mr. Glassman to answer.

A. Well, my opinion, no. Neither during 1973 to any time up to the present has he fallen in the category where he could manage his own affairs without supportive assistance. I don't know, did your question entail examples of that?

Q. (BY MRS. LEVINE) No. You gave all the examples prior thereto, did you not, about what you observed? On the basis of your observation, I asked you to give an opinion which I think you can give us

as a layperson; and there has been objection on the part of government counsel.

A. I told you what I observed about his appearance. That's all I'm competent on.

Q. All right.

MRS. LEVINE: I have no further questions.

CROSS-EXAMINATION

BY MR. BOWMAN:

Q. I believe you stated that you're not trained as a mental health practitioner.

A. That's a fair statement.

Q. And you don't hold yourself out as an expert in the field of mental competence or incompetence.

A. No.

Q. You have tried cases involving competence and incompetence?

A. Yes.

Q. When you tried those cases, you got an expert witness.

A. In most instances, yes.

Q. You took care of Guy Levine's finances.

A. Yes.

Q. And you did not direct of participate in his medical treatment. Is that true?

A. Well, qualified, yes, that's true.

Q. Well, I'll fall into the trap and let you explain qualification.

A. Well, Mr. Bowman, as an attorney-- I don't mean to be evasive in my answer and I would not presume to tell anything but the truth, but I think it has to be expanded. I did not treat him. Without someone occupying the role I had and have, in my honest opinion, he could not function. Examples of that, for instance, are he would, because of traffic violations, lose his license because he wouldn't answer those violations. In essence, he would

withdraw and wouldn't face the problem. He would not respond to an insurance notice. The insurance would lapse, and then someone like myself would have to say to someone, "Please give this man insurance." That was a very difficult task during the 1973, '74 period that I encountered. The example I gave with the house where they wanted him out of there, and it was only because I prevailed on them that he was a Menninger patient, severely ill and needed somebody on his team and that I would get him a cleaning person to make it livable so it didn't smell so bad that tenants around him would still live there. It was only because of that that they've even let him stay there. I think it's a fair statement, and I don't think I'm exaggerating when I make it, that without that complimentary and supplementary activity, Guy Levine in my opinion would not have been able to function outside the hospital.

Q. But, nevertheless, your primary role or your only role was to manage personal and financial

type problems.

A. As opposed to treatment problems, yes.

Q. You didn't make any decision on how he would be treated.

A. That's not a fair statement in the respect that when problems got more severe in my judgement, not only did I talk to his parents or write his parents, and that was on a fairly regular basis, but I also made the hospital aware of those problems, so I don't think that's a fair statement. I think I did participate to that degree.

Q. By making other people aware of problems.

A. That only would have been known--would only have been known to me and would not have been known to the physicians at the Menninger Foundation or the psychologist who treated him.

Q. But you didn't make the decision that Guy Levine should leave the Menninger Foundation---

A. No, sir.

Q. -- and take up residence in an apartment.

A. No, sir.

Q. And you didn't make a final decision that Guy Levine could not live in a Menninger aftercare facilities.

A. No, sir.

Q. Or you didn't make a decision that he couldn't go to some other town and get treatment there.

A. You're correct.

Q. Whatever your personal opinion was, the psychiatrist and psychologist and Guy's parents made those decisions.

A. That's a fair statement.

Q. You got paid for your services you rendered to the Levine's?

A. Yes, sir.

Q. You're still working for the Levines or Guy?

A. For the most part, I'm really working for Guy because if I was working for the Levine's I would resign the role. That's not said to be disrespectful or critical of the Levines. It's just that I would not see me functioning-- I would not want to undertake this again, and I would not do it but for the fact that I really think it's a necessary role that Guy has to have fulfilled.

Q. Well, Mr. and Mrs. Levine, the Petitioners in this case, are the ones who pay your fee.

A. That's correct, with their funds as far as I know.

Q. And this deposition is being taken in your office.

A. Yes, sir.

Q. And although you're a witness you sat through the prior two depositions.

A. That's a fair statement.

Q. Are you being paid for this time?

A. I am going to bill this time, yes, sir.

Q. To the Levines?

A. Yes, sir.

Q. And while the other two depositions were going on, Mrs. Levine has consulted with you, not extensively but perhaps once or twice.

A. Not really. I volunteered two statements to her husband who was sitting in the room suggesting that he make that known to her but---

Q. Make what known?

A. Make the content of those two statements, two little notes, known to her; but she really hasn't consulted with me during the process of these two depositions.

Q. Well, I will not inquire to the substance of the communications. Okay, how often did you see Guy Levine during the period 1974 to 1975?

A. In all likelihood no less often than once per week except if he had gone out of town for some

reason; and on quite a few occasions more than once per week. Whenever some so-called crisis arose, it would be on more than once a week that basis.

Q. Have you ever computed how many hours you billed to the Levines for work with--on a per weekly basis?

A. No. It would be extremely difficult to do that because of crazy nature of how the problems pop up and where they pop up and the calls at home and the calls at night, the calls early in the morning. It's very, very difficult to keep those kind of records. Because of the nature of what I undertook, I probably haven't been as conscientious about billing for what time I spent as I should have been. That's not to mention the amount of time that other people in my office have spent that was in administrative type things, but they did get the crash calls too, and I couldn't give you an accurate answer other than saying it's not insignificant.

Q. Did you earlier testify you thought that it would be about an hour a week on an average?

A. I don't think I testified to that. I don't think that's a fair statement.

MRS. LEVINE: I didn't hear Mr. Bowman's question.

MR. GLASSMAN: Did I earlier testify it was about an hour a week, and I don't believe I did testify to that, and if I did I don't think it was a fair statement.

Q. (BY MR. BOWMAN) Well, did you earlier testify that you would doubt if it was more than two hours per week.

A. No. I was talking with relationship to the amount of time the cleaning lady spent cleaning Guy's personal apartment.

Q. Okay. Do you have an estimate on how many hours you might have spent per week?

A. Fixing the time to the 1974, '75 period?

Q. Yes.

A. There were times when it would have been no more than maybe 30 minutes; there were times when it would have been a half a day, a week; there were times when it might have been even more than that. It would vary with the crisis that I was addressing.

Q. So other than when a crisis arose, Guy was essentially on his own in his apartment.

A. Not in my opinion.

Q. Who was in the apartment supervising him?

A. Not being argumentative, I was quarreling with your frame of "on his own." In my judgement, if I answered that question very directly, Guy can't totally function on his own, at least couldn't during this period, 1974, '75. He couldn't manage the amount of food that he would acquire week to week that he would put in his refrigerator. As an example

of that, he would come to the office on a Wednesday, after I'd given him his allotment on Monday, and say, "I've spent every cent I've got on food. I'm without money to eat for the rest of the week" at the time being severely obese. That's one example of why I don't consider that "on his own." I wasn't physically there, Mr. Bowman.

Q. Let me rephrase the question.

A. All right.

Q. Was anybody physically there to direct his day-to-day activities.

A. As far as I know, no mental health practicioner was in the house day-to-day directing his daily activities.

Q. Were they ever in the house?

A. I heard Doctor Norris's testimony to the effect that he was there at least on one occasion. I know of no other time.

Q. Were you ever in the apartment?

A. Once.

Q. And how do you describe the apartment.

A. At the time I was in it, I was called by Mrs. Denton - this was during the same period of time, I have it in my notes - to the effect that she wanted him out of there. Since September of '74 if I'm correct, it's in that period because I looked. She wanted him out of there. "It stunk; it was filthy; he wasn't getting along with anybody, any of the neighbors; come see for myself," that sort of thing. That was the occasion.

Q. Other than the state of cleanliness, would you describe it as an ordinary apartment?

A. Yes.

Q. Wasn't especially furnished with any---

A. No.

Q. -- medical paraphernalia or anything for psychiatric treatment?

A. Well, I know of no medical paraphernalia

that one uses for psychiatric treatment so I couldn't recognize that, Mr. Bowman.

Q. You never authorized any expenditures for special furnishings other than expenditures for normal furnishings.

A. No.

Q. Since you controlled his finances, you would know whether he attended college or not.

A. Yes.

Q. And did he?

A. For a very, very short period of time, yes.

Q. Do you know how many jobs he held, if any?

A. I got him one job, the one I think he held the longest; and the kind of work he was doing was custodial work. And it was only after many requests that they would keep him for the period he worked which was about six or seven days. I think he may have held two other jobs. They were for such brief

periods of time that they would be less than a week. He wasn't accepted by employers, fellow workers. He wasn't suitable for what kind of work he was able to do, he couldn't do it.

Q. You say you helped Mr. Levine attempt to gain welfare assistance.

A. No, sir. Mr. Levine on one occasion when he was particularly ill was looking for ways of getting more funds than I would give to him, and he made a welfare assistance application, and I learned about it through fortune, I guess, and cleared up the problem otherwise-- which I considered part of his ilness. But anyway he would maneuver to get money from me and anybody else he could get it from.

Q. To your knowledge, did he ever get welfare assistance?

A. No. Mr. Bowman, he may have gotten one check, I just can't remember, that was repaid I believe. I remember having conversations and letters

to the Welfare Department. They fell outside the 1974, 1975 period that we're talking about, but I am aware that during that period he did other things to get money from me, devious things that were a product of the problems that he was experiencing.

Q. Okay. When you hired a cleaning person for Mr. Levine, did you consult with the doctors at Menningers as to whether you should do that?

Q. I don't remember but I don't think I did.

Q. And you basically hired her to clean the apartment.

A. Yes.

Q. And not to supervise Mr. Levine.

A. Oh. yes.

Q. Well, if I can get back to one other point, you don't hold yourself out as an expert on mental problems in being able to diagnose and treat them.

A. That's correct.

Q. And if you have an opinion as to whether he should be treated in Topeka or elsewhere, that opinion is based upon conversations with his doctors.

A. That's not a fair statement.

Q. Your statement would be that you know that Topeka is the best place for him?

A. No, sir. Ask me what my statement is and I'll tell you.

Q. Well, if we can keep it short, what's your statement.

A. Well, it's not based on anything the doctors have said. It's based on my own observations, and I don't pretend to be able to treat anybody; but because of my training and experience, I think I can observe and know what I'm observing; and from observing him over a long period of time, the problems he's been into, it's my opinion that he is severely ill and is in fact incapacitated. That's my opinion.

Q. Okay.

MR. BOWMAN: I have no further questions.

MRS. LEVINE: I have no further questions.

/S/
ARTHUR A. GLASSMAN

STATE OF KANSAS)
) ss:
COUNTY OF SHAWNEE)

Subscribed and sworn to before me this 20 day of January 1981.

Vera Lentz
Notary Public

My appointment expires:_____

Office - Supreme Court, U.S.
FILED
MAY 27 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1674

In the Supreme Court of the United States

OCTOBER TERM, 1982

IRVING S. LEVINE, ET UX., PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-1674

IRVING S. LEVINE, ET UX., PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

The question presented in this federal income tax case is whether the lower courts correctly determined that petitioners were not entitled to deduct as medical expenses under Section 213 of the Internal Revenue Code of 1954 (26 U.S.C.), the costs they incurred in renting an apartment for their son and otherwise supporting him while he was being treated for mental illness on an out-patient basis away from his home.

The facts of this case may be summarized as follows: After petitioners' son, Guy Levine, became too old to continue treatment for his mental disorder on an in-patient basis at the Menninger Clinic's Children's Hospital, petitioners, Guy and Guy's doctors explored alternative forms of treatment (Pet. App. 3a, 16a-18a). Other residential centers were unwilling to accept Guy for treatment and Guy was unwilling to consider relocating to these other institutions (Pet. App. 17a).

Petitioners therefore chose to have Guy continue individual psychotheraphy at the Menninger Clinic on an outpatient basis. Because petitioners did not live in Topeka, Kansas, where the clinic was located, they arranged for Guy's housing, transportation and maintenance while he was in Topeka.[1] Accordingly, petitioners retained a local attorney, Arthur Glassman, to act as their and Guy's representative to assist and supervise Guy in arranging the details of his living arrangements (Pet. App. 3a, 19a).

Petitioners and Glassman, using petitioners' funds, rented for Guy a furnished, efficiency apartment, and Glassman thereafter disbursed petitioners' funds to Guy to buy groceries, clothes, gasoline for his automobile and whatever else was required, and to pay Guy's rent, traffic tickets, utility bills, and other charges. Glassman also helped Guy find employment, arranged for automobile insurance coverage, hired a cleaning woman to maintain Guy's apartment and generally acted as a surrogate parent for Guy. In order to discharge his duties, Glassman generally met with Guy no less than once a week (Pet. App. 3a, 20a-21a).

The apartment rented for Guy had no special medical furnishings of any type and, indeed, except for one occasion, no medical treatment of any kind was given to Guy there. Nor were Guy's activities in the apartment subject to any day-to-day medical supervision (Pet. App. 19a-20a).

Petitioners sought to deduct as medical expenses the total costs of supporting Guy and the fees paid to Glassman. The Commissioner disallowed the bulk of the claimed

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[1] At the time Guy was discharged from the Children's Hospital at the Clinic, the facility had no apartment living plan. Guy would not have been accepted into the Adult Hospital's apartment living program because that program required a degree of self-sufficiency that Guy did not possess (Pet. App. 3a, 19a).

deductions[2] on the ground that the costs were not deductible medical expenses, but were non-deductible personal expenses (Pet. App. 33a). The Tax Court upheld the Commissioner. It concluded that because Guy's apartment was not specially equipped and no regular therapy or supervision was performed there, the costs of maintaining him in that apartment were no different from those incurred in maintaining a personal residence for him (Pet. App. 27a). The court also held that the managerial services provided by Glassman were not so "essentially bound up with Guy's medical care" as to warrant deduction as medical expenses (Pet. App. 33a). The court of appeals affirmed, stating that the "fine line of deductibility should be drawn based upon the principle that only those medically necessary away-from-home living arrangements which involve continuous daily medical care on the premises may give rise to favorable tax treatment for the cost of meals and lodging" (Pet. App. 9a).

1. The decision below correctly held that the expenses for room and board and the like incurred by petitioners in supporting their mentally ill son were not deductible as medical expenses under Section 213 of the 1954 Code

Section 213 of the Code, which allows a deduction for certain medical expenses, represents a narrow exception to the general rule established by Section 262 of the 1954 Code that no deductions shall be allowed for "personal, living, or family expenses." In the present circumstances, the costs at

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[2]The Commissioner permitted petitioners to deduct certain transportation expenses incurred for Guy's periodic visits to the clinic — generally for two 50-minute sessions weekly — and for Guy's occasional trips home. See Treasury Regulations on Income Tax (1954 Code), Section 1.213-1(e)(1)(iv) (26 C.F.R.).

issue in this case may only be deducted if they constituted "amounts paid * * * for the diagnosis, cure, mitigation, treatment, or prevention of disease, or for the purpose of affecting any structure or function of the body * * *." Section 213(e)(1)(A).

Under longstanding Regulations, the cost of meals and lodging may be deducted as medical expenses only where an individual is in a hospital or similar institution and the principal reason for his presence in the institution is the availability of medical care in the institution. Treasury Regulations on Income Tax (1954 Code), Section 1.213-1(e)(1)(v) (26 C.F.R.). The extent to which costs for care in an institution other than a hospital constitute deductible expenses is a question of fact that depends upon the condition of the individual and the nature of the services involved, not the nature of the institution. Section 1.213-1(e)(1)(v). The authorities agree, however, that a person's living expenses while receiving *outpatient* medical care away from home are ordinarily not deductible as medical expenses. *Commissioner* v. *Bilder*, 369 U.S. 499, 501-504 (1962); *Montgomery* v. *Commissioner*, 428 F.2d 243, 245 (6th Cir. 1970); *Oliver* v. *Commissioner*, 364 F.2d 575, 578-579 (8th Cir. 1966); Section 1.213-1(e)(1)(iv) and (v).

As this Court recognized in *Commissioner* v. *Bilder*, *supra*, 369 U.S. at 501, under the predecessor to Section 213, many expenses incurred for meals and lodging while away from home for medical reasons were deductible as expenses for "medical care." But the draftsmen of the 1954 Code explicitly intended to change that rule. H.R. Rep. No. 1337, 83d Cong., 2d Sess. A60 (1954); S. Rep. No. 1622, 83d Cong., 2d Sess. 219 (1954). As the Court stated in *Bilder* (369 U.S. at 503): "* * * Congress' purpose to exclude such expenses [for meals and lodging] as medical deductions under the new bill is unmistakable in these authoritative pronouncements * * *."

While the principal focus of Congress' revision of the laws might have been, as petitioners contend (Pet. 20-24), on the "vacation-type" abuse prevalent under the predecessor to Section 213, the rule Congress adopted to counter the abuses was broader in scope. Thus, the House Report (H.R. Rep. No. 1337, *supra*, at 30) on the amendment states:

> A new definition of "medical expenses" is provided which incorporates regulations under present law and also provides for the deduction of transportation expenses for travel prescribed for health, *but not the ordinary living expenses incurred during such a trip* (emphasis supplied).

See S. Rep. No. 1622, *supra*, at 219-220. To accomplish this result, Congress "enunciated the broad rule that the expenses of meals and lodging at a prescribed location do not constitute medical expenses unless incurred as part of a hospital bill," *Rose* v. *Commissioner*, 52 T.C. 521, 529 (1969), aff'd mem., 435 F.2d 149 (5th Cir. 1970), or in hospital-like surroundings, 52 T.C. at 529-530. Because the expenses here for meals and lodging were not part of a hospital bill or incurred in a hospital-like environment, the courts below correctly disallowed petitioners' deductions.

2. As petitioners note (Pet. 27-28), one appellate court has allowed a deduction for meals and lodging provided to a taxpayer in a "substitute institution" (*i.e.*, a hotel or apartment) while convalescing. See *Kelly* v. *Commissioner*, 440 F.2d 307 (7th Cir. 1971).[3] Contrary to petitioners' claim, however, there is no conflict between *Kelly* and this case.

In *Kelly*, the taxpayer had been in New York City on business when stricken with appendicitis. After surgery, but before he was well enough to return to his home, the

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[3] *Ungar* v. *Commissioner*, 22 T.C.M. (CCH) 766 (1963) is distinguishable on the same basis (see Pet. App. 7a n.1).

taxpayer was discharged from the hospital somewhat prematurely because of a shortage of hospital beds. He was, however, told to remain in New York for a time because of certain medical complications. He therefore rented a room in the city and received medical care in this room. See 440 F.2d at 311. Thus, the court in *Kelly* held that the hotel room rented by the taxpayer constituted in essence a substitute hospital room "because his condition is such that the availability of medical care * * * *in such institution* is a principal reason for his presence there" (Treasury Regulations, Section 1.213-1(e)(1)(v)(a); emphasis added). After determining that the situation there complied with the test set forth in the Regulation for the deduction of meals and lodging expenses while an individual is in an institution, the court in *Kelly* permitted the claimed deduction.[4]

As the court of appeals and the Tax Court below correctly noted (Pet. App. 6a-7a, 28a), the facts of this case are not "identical" to *Kelly*. In *Kelly*, the "taxpayer's condition caused him to stay in the hotel where he could receive continuous daily care in close proximity to his physician after being discharged prematurely from the hospital" (Pet. App. 6a). Here, however, during the two-year period involved, "Guy did not receive any medical care on the premises which [petitioners] would have [the court] view as

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[4]This same distinction applies to Rev. Rul. 69-499, 1969-2 Cum. Bull. 39, which held that the meal and lodging expenses of a mentally retarded individual in a specially selected private home were deductible (see Pet. 35). In the ruling, the patient was receiving treatment *in the home*. That was his only reason for being there.

Although Section 6110(j)(3) of the 1954 Code explicitly bars the use or citation of such documents as precedent, petitioners cite Private Letter Ruling # 7714016, IRS Let. Rul. Rep. (CCH) 1071-1072 (1977). The situation at issue in that ruling concerned a private halfway house regularly engaged in providing care. Accordingly, the ruling's conclusion that the costs of meals and lodging at the halfway house may be deducted is not inconsistent with the decision below.

a substitute institution" (Pet. App. 7a). The apartment had no special medical adaptations and no one supervised Guy on a day-to-day basis at the apartment (Pet. App. 7a). As the court concluded, "We do not reach the legal issue decided by the Seventh Circuit; in this case the deducted costs were incurred incident to services rendered, but unlike in *Kelly*, the services were not rendered *in* the alleged substitute institution" (Pet. App. 7a; emphasis in original).[5]

3. The courts below also correctly denied medical expense deductions for the amounts paid to the attorney Glassman. As the court of appeals properly recognized (Pet. App. 10a), legal expenses incident to medical care have only been allowed as a deduction when they are necessary to "legitimate a method of medical treatment." *Gerstacker* v. *Commissioner*, 414 F.2d 448, 453 (6th Cir. 1969). In *Gerstacker*, the taxpayer was allowed to deduct as a medical expense the legal fees incurred to establish guardianships which were required before taxpayer's wife could be involuntarily committed to a mental hospital. The court also held, however, that the legal fees attributable to management of the guardianship estate were not deductible, stating (*id.* at 453) "These services were not essential to legitimate the therapy and therefore lack the proximate relationship to the illness of Mrs. Gerstacker required for deductibility as expenses

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[5]See also *Estate of Levine* v. *Commissioner*, No. 82-4070 (2d Cir. April 11, 1983) (deduction denied for rehabilitative travel program for psychologically troubled daughter); *Volwiler* v. *Commissioner*, 57 T.C. 367 (1971) (deduction denied for an apartment and care for taxpayers' daughter who suffered from a mental disorder and used the apartment as a halfway house in her rehabilitation efforts); *Hunt* v. *Commissioner*, 31 T.C.M. (CCH) 1119 (1972) (deduction denied for cost of taxpayer's son residing with a foster family while receiving outpatient treatment at Menninger Clinic); *Allen* v. *United States*, 46 A.F.T.R.2d 5402 (Kan. June 20, 1980) (deduction denied for rental expenses for daughter's separate apartment although doctor recommended removal from family home).

for medical care." As the court of appeals pointed out (Pet. App. 10a), in this case Glassman's day-to-day management of Guy's affairs was not necessary to legitimate Guy's treatment but, rather, to manage his affairs during treatment. *Gerstacker* is therefore distinguishable.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

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